Supreme Court, U.S.
FILED

No. D

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OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1995

CHARLES ROGERS, et al.,

Petitioners,

v.

WALTER ROGERS, et. al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

E. E. Sanders, Jr., Esquire*
***Counsel of Record**
Attorney at Law
12504-C Lake Ridge Drive
Woodbridge, Virginia 22192
(703) 690-7000

Counsel for Petitioners

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

84pp

QUESTIONS PRESENTED

WHETHER PERSONAL PROPERTY DECLARED EXEMPT AT A CERTAIN VALUE BY OPERATION OF THE UNITED STATES BANKRUPTCY LAW CAN BE THE SUBJECT OF A SUBSEQUENT STATE COURT FRAUDULENT CONVEYANCE ACTION FILED BY THE SAME PARTIES WHICH FAILED TO CHALLENGE THE VALUE OR THE EXEMPT NATURE OF SUCH PROPERTY IN THE UNITED STATES BANKRUPTCY COURT.

WHETHER THE VALUE OF EXEMPT PROPERTY SET BY OPERATION OF UNITED STATES BANKRUPTCY LAW CAN BE CHALLENGED IN A SUBSEQUENT STATE COURT ACTION BY THE SAME PARTIES WHICH DID NOT CHALLENGE SAID VALUE IN THE UNITED STATES BANKRUPTCY COURT.

LIST OF ALL PARTIES
TO THE PROCEEDING IN THE COURT
WHOSE JUDGMENT IS SOUGHT TO
BE REVIEWED

Charles Rogers,
Eleanor Rogers,
National Sportsman Association, Inc.,
A Virginia Corporation,
(Hereafter "NSA, Inc.)
American Sportsman Association, Inc.,
A Virginia Corporation,
(Hereafter "ASA, Inc.)

PETITIONERS

Walter Rogers,
Ronald Rogers,
Rogers Brothers, Inc.,
A Virginia Corporation,

RESPONDENTS

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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES ROGERS, et. al,

PETITIONERS,

v.

WALTER ROGERS, et. al,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

The Petitioner, Charles Rogers, et. al, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Virginia in this case.

OPINION BELOW

The opinion of the Supreme Court in this case is unreported and may be cited as Rogers, et. al. v. Rogers, et. al., Record No. 951638 (Va. Sup. Ct., 20 December 1995; rehearing denied 1 March 1996). The opinion of the trial court is likewise unpublished and may be cited as Rogers, et. al v.

Rogers, et. al., Chancery No. 33841. (Order entered 9 June 1995; Reconsideration Motion denied 30 June 1995).

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Virginia on 20 December 1995, Rehearing denied 1 March 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(a), the Petitioner having asserted below and herein deprivations of rights secured by the Constitution and Laws of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Section 2 of the United States Constitution states, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the land; and the judges in every State shall be

bound thereby, any thing in the Constitution or Laws of any State to the contrary not withstanding.

APPLICABLE UNITED STATES STATUTES:

11 U.S.C. §522(b) establishes exempt property under either Federal Law [11 U.S.C. §522(d)] or under state law [11 U.S.C. §522(b)(2)(A&B)]. See Appendix, Page 31, for pertinent text of §522(b).

11 U.S.C. §522(c) states that exempt property cannot be taken for most pre-petition debts. See Appendix, Page 32 for full text of §522(c).

11 U.S.C. §522(l) - "The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section...unless a party in interest objects, the property claimed as exempt on such list is exempt."

BANKRUPTCY RULE 4003(b)

The Trustee or any creditor may file objections to the list of property claimed as exempt within thirty days after the conclusion

of the meeting of creditors here pursuant to Rule 2003(a) or the filing of any amendment to the list unless, within such period, further time is granted by the Court.

STATEMENT OF THE CASE

This case arises out of an agreement by Charles Rogers, Petitioner, to manage certain stock holdings of Walter and Ronald Rogers, and Rogers Brothers, Inc., Respondents.

Substantial losses occurred to the Respondents' holdings; legal action was threatened and/or filed. Petitioner, Charles Rogers, sought the protection of the courts by filing a Chapter Seven Petition in Bankruptcy, in June 1990 in the United States Bankruptcy Court for Eastern District of Virginia. In that petition, Petitioner named Respondents as chief creditors. Petitioner also declared a 100% interest in Petitioner corporation, National Sportsman

Association, Inc. (NSA, Inc.) as exempt property in accordance with 11 U.S.C. §522(b) and valued same as $10.00 via both homestead deed pursuant to Virginia Statutes and on the Petition in Bankruptcy. At the Hearing of Creditors pursuant to 11 U.S.C. §341, Respondents appeared by counsel and questioned the Petitioner Charles Rogers. The Respondents had notice and opportunity to investigate and review the schedules of exempt property but allowed the deadline of Bankruptcy Rule 4003 (30 days subsequent to the §341 hearing) to pass without challenging the exempt nature or the value of NSA, Inc. On 1 July 1990, Petitioner Charles Rogers conveyed the entire interest in NSA, Inc. to his wife, Eleanor Rogers, a Petitioner in this action. On 3 July 1990, Eleanor conveyed much of the assets and liabilities of NSA, Inc. to another Virginia Corporation specially created for this

purpose, Petitioner, American Sportsman Association, Inc. (ASA, Inc.).

Respondents contested the dischargeability of $445,000.00 worth of indebtedness in various counts sounding in fraud and breach of fiduciary duties and lost on all counts except for $145,000.00 in debts arising out of a comingling of fiduciary and personal funds. All other debts were discharged by order of the United States Court for the Eastern District of Virginia. This was affirmed on appeal. Respondents unsuccessfully requested the Trustee to reopen the Chapter 7 so as to avoid the transfer of NSA, Inc. See Appendix, pgs. 33-40.

Respondents filed a state court action in the Circuit Court of Prince William County, Virginia, alleging fraudulent conveyance of NSA, Inc. from Charles Rogers to Eleanor Rogers. When Respondents

discovered the existence of ASA, Inc., they amended their Bill of Complaint to allege four counts as follows:

Count I - fraudulent conveyance of NSA, Inc. from Charles Rogers to Eleanor Rogers;

Count II - fraudulent conveyance of NSA, Inc. assets from NSA, Inc. to ASA, Inc.;

Count III - this count asked the court to pierce the corporate veil; and

Count IV - conspiracy by Charles Rogers and Eleanor Rogers to defraud creditors which asked for $30,000.00 actual damages and $500,000.00 punitive damages.

Count IV is the only count which has a request for in personam judgment against Charles Rogers and Eleanor Rogers. Counts I and II ask the court to set aside the transactions as fraudulent and place ASA, Inc. into NSA, Inc. and then place NSA, Inc. in the hands of Charles Rogers and have NSA,

Inc. sold with the proceeds applied to Walter Rogers, et. al.'s claim (the $145,000.00 pre-petition debt).

Petitioners filed various motions and pleas in bar alleging both res judicata and collateral estoppel and citing the judgment of the United States Bankruptcy Court and this court's opinion in Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) as barring the state court action (res judicata) or relitigation of value and or exempt nature of NSA, Inc. (collateral estoppel) [state law prohibits a fraudulent conveyance action on property already determined by state or federal law to be exempt - see Oliver v. Givens, 204 Va. 123, 129 SE2d 661 (1963)]. All were denied.

Petitioner Charles Rogers filed a Chapter 13 Bankruptcy action and Respondents moved the Bankruptcy Court to grant relief from the automatic stay. Judge Mitchell

reluctantly granted relief due to judicial comity. Appendix, pgs. 41, 50.

At trial, the state court (The Honorable Judge William D. Hamblen) found a fraudulent conveyance of both NSA, Inc. from Charles Rogers to Eleanor Rogers and from NSA, Inc. to ASA, Inc. See Appendix pgs. 8-26.

Motion to reconsider was heard on 30 June 1995 reincorporating all the federal questions raised as to the preclusive effect of the bankruptcy court judgment and the failure of Respondents to litigate timely the value/exempt nature of NSA, Inc. See, Appendix pgs. 56-57.

Appeal was had to the Virginia Supreme Court, preserving all the federal questions for review via appropriate assignments of error. The Virginia Supreme Court denied appeal and summarily affirmed on 20 December 1995 but a petition for rehearing was filed

pro se and that petition was denied on 1 March 1996. (See Appendix pgs. 1-2).

ARGUMENT

I. A PLEA OF RES JUDICATA AND/OR COLLATERAL ESTOPPEL IN STATE COURT BASED ON THE ALLEGED PRECLUSIVE EFFECT OF A JUDGMENT OF A UNITED STATES COURT IS A FEDERAL QUESTION.

A plea of res judicata or collateral estoppel arising by virtue of the judgment of a Federal Court is a question arising under both the Supremacy Clause of the United States Constitution and Federal Law. Stoll v. Gottlieb, 305 U.S. 165, 167 (1938) ("As the intention is that the ruling below disregarded decrees of a court of the United States it raised a federal question..."); National Foundry and Pipe Works, Ltd. v. Oconto City Water Supply Co., 183 U.S. 216, 233 (1902) ("As it is thus demonstrated that the determination whether the Court below correctly applied the plea of res judicata necessitates our deciding whether due effect was given to the decree in the mechanic's

lien suit, a Federal Question is presented which it is our duty to determine."); Pittsburgh, C.C. and St. Louis R. Co. v. Long Island Loan & Trust Co., 172 U.S. 493, 510 (1899) ("The question whether a state court has given due effect to the judgment of a Court of the United States is a question arising under the Constitution and Laws of the United States and comes within the jurisdiction of the Federal Courts by proper process...") This Court clearly has jurisdiction over this cause.

II. A VALID JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT BETWEEN THE PARTIES WAS OBTAINED IN THIS CASE.

The judgment of the United States Bankruptcy Court for the Eastern District of Virginia, affirmed on appeal by the United States Court of Appeals for the Fourth Circuit, granted discharge as to all debts other than the $145,000.00 violation of a

fiduciary duty found by the court. See Appendix pgs. 3, 6. This is a pre-petition debt.

Petitioner did timely file a homestead deed and also exempted 100% of the stock/interest in Petitioner NSA, Inc. on the bankruptcy petition and assigned it a value of ten dollars. See Appendix pgs. 27-28. Neither the exempt nature nor the value of NSA, Inc. were ever questioned within the time period of Bankr. Rule 4003. Thus under operation of United States Bankruptcy Law it became exempt. 11 U.S.C. §522(l) ("Unless a party in interest objects, the property claimed as exempt on such list is exempt."); Rule of Bankruptcy Procedure 4003 ("The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors..."). By virtue of law, such exemption is unchallengeable in

the federal courts. Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) (Untimely action bars objection to exemption by trustee).

III. THIS COURT'S OPINION IN TAYLOR BARS RELITIGATION OF BOTH THE VALUE AND THE EXEMPT NATURE OF NSA, INC.

This Court's opinion in Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) establishes the doctrine that objection to the exempt nature and/or value of exempt property must be timely to be effective. See 503 U.S. at 643-44. Furthermore, this Court in Taylor held that unchallenged exempt property becomes exempt by operation of and by virtue of Federal Law.

> We reject Taylor's argument. Davis claimed the lawsuit proceeds as exempt on a list filed with the Bankruptcy Court. Section 522(l), to repeat, says that '[U]nless a party in interest objects, the property claimed as exempt on such list is exempt.' Rule 4003 gives the trustee and creditors 30 days from the initial creditors' meeting to object. ...Section

> 522(l) therefore has made the property exempt. Taylor cannot contest the exemption at this time whether or not Davis had a colorable statutory basis for claiming it.
>
> 503 U.S. at 643-44 (emphasis added)

The Respondents did not timely challenge the value or the exempt nature of NSA, Inc. in the Bankruptcy proceeding. Thus, under this Court's opinion in Taylor, the Respondents could not challenge the exempt nature or its value in the original bankruptcy proceeding.

IV. THE EFFECT OF THE EXEMPT NATURE OF NSA, INC. IS TO REMOVE IT FROM BEING AVAILABLE FOR THIS PRE-PETITION DEBT BY VIRTUE OF FEDERAL LAW.

The effect of the exempt nature of NSA, Inc. is to prevent its acquisition and/or collection of it or its proceeds for any pre-petition debt (subject to certain exceptions not applicable to this appeal) See 11 U.S.C. §522(c).

Yet the Respondents sought to collaterally attack the exempt nature (and value) of NSA, Inc. for collection of a pre-petition debt in violation of Federal Law. Under Taylor a federal bankruptcy court could not entertain such a fraudulent conveyance action on exempt property.

A creditor cannot use a state court to collect a pre-petition debt from property which is exempt by virtue of Federal Law. To do so is to make the Bankruptcy Act a nullity and to hinder the debtor's right to a fresh start. The trial court in this case ignored the exempt nature of the property and entered a $200,000.00 judgment in favor of Respondents from the profits of NSA, Inc.

No state court may impair or destroy a federally-created right without violating the Supremacy Clause of the United States Constitution. This state court did so.

V. THE STATE COURT DISREGARDED A FEDERAL PROPERTY RIGHT IN NOT SUSTAINING THE PLEA OF RES JUDICATA AS TO NSA, INC.

The State court relied on the case of Addison v. Reavis, 158 B.R. 53 (E.D. Va. 1993) aff'd sub nom., Ainslie v. Grablowski, 32 F.3d 562 (4th Cir. 1994) which sought to distinguish Taylor by stating a subjective intent by the debtors in Addison to exempt only the nominal value listed on their schedules. See 158 B.R. at 59. Further Addison cited a public policy rationale for its decision:

> "Courts should not allow debtors to employ this practice [of giving a nominal claim more value than what is stated] in order to obtain a total ... exemption in excess of the maximum allowed under ... Law, as this would be but an invitation to the perpetration of the grossest frauds upon the rights of creditors..."
>
> 158 B.R. at 57

However, this Court rejected this

"public policy" argument in Taylor. See 503 U.S. 644-45 (Taylor argued that the application of 11 U.S.C. §522(l) should be limited to exemptions claimed in good faith; this Court rejected it.).

Furthermore, Addison was criticized by the Eleventh Circuit. In re Green, 31 F.3d 1098 (11th Cir. 1994).

Debtor Green exempted a personal injury action at a value of one dollar pursuant to Alabama Law. 31 F.3d at 1098. The trustee (Allen) did not object to either the one dollar value or its exempt nature. 31 F.3d at 1099.

Allen settled the suit for $15,000.00 and sought to apply it to creditors. Id. Green moved for the entire amount of her recovery to be paid to her. The Bankruptcy Court denied her motion. Id. The District Court reversed, citing Taylor. Id. Allen appealed.

The Eleventh Circuit affirmed and held the entire settlement was in fact exempt. Id. The court subjected Addison to a withering and critical analysis stating that Taylor should have been followed by the Addison court. 31 F.3d at 1100-1101. ("The court [in Addison] distinguished Taylor on the dubious ground that [Taylor facts show a clear intent to exempt the entire amount but in Addison the debtors did not do so and to allow it would create incentives for fraud]. That rationale flies in the face of Taylor.")

Even this case is distinguishable from Addison. Charles Rogers sought to exempt the entire interest/100% of the stock in NSA, Inc. and valued it at $10.00. See Appendix pg. 27, 29. Petitioner Rogers further stated in schedule B-2 that as to NSA, Inc., "Liabilities exceed assets", Appendix pg. 29. The trustee ruled this was

a no asset chapter 7 bankruptcy. Judge Mitchell of the United States Bankruptcy Court for the Eastern District of Virginia in a related Chapter 13 action showed strong support for Petitioners' position but deferred to the State Court on the grounds of judicial comity. See Appendix pgs. 41-55. The State Court ignored the mandates of Federal Law.

VI. CONCLUSION

This Court's holding in Taylor barred relitigation of either the exempt nature of NSA,Inc. or its value. All of NSA, Inc. was exempt by operation of Federal Law. Therefore NSA, Inc. cannot be touched by the State Court in a collection action for a pre-petition debt of Respondents; the conveyance of exempt property cannot be the subject of a fraudulent conveyance action. Neither can the value assigned to NSA, Inc. by Petitioner Rogers be litigated again by

Respondents, nor the profits of exempt property can be taken for an in personam judgment.

A right created and protected by Federal Law was disregarded and destroyed by a state court's action. This Court's holding in Taylor v. Freeland & Kronz was not followed. Petitioners Charles Rogers, Eleanor Rogers, NSA, Inc., and ASA, Inc. have now reached this Court and pleads for this Court to uphold their rights and reverse the judgment of the Virginia Supreme Court affirming the Order of the Circuit Court of Prince William County. Petitioners ask this Court to do no more than what this Court does for any other litigant - preserve and protect their legal rights. Only this Court's granting of certiorari will protect and preserve these federally created rights. Thus the Petition asks this Court to grant this writ and set this case for plenary

review or summarily reverse the judgment of the Virginia Supreme Court and remand this case to that court in light of Taylor with instructions to annul the in personam judgment of $200,000.00 against Petitioner Eleanor Rogers and to dismiss the state court fraudulent conveyance action.

Respectfully submitted,

Charles Rogers, et. al.

By: _____
(counsel)

E. E. Sanders, Jr., Esquire
12504-C Lake Ridge Drive
Woodbridge, VA 22192
(703) 494-4681 / 690-7000
Admitted to the Bar of the United States Supreme Court on 17 June 1991.

APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 20th day of December, 1995.

Charles Rogers, et al., Appellants,

against Record No. 951638
Circuit Court No. CH-33841

Walter Rogers, et al., Appellees.

From the Circuit Court of Prince William County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 1st day of March, 1996.

Charles Rogers, et al., Appellants,

against Record No. 951638
Circuit Court No. CH-33841

Walter Rogers, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the letter from the appellants dated January 2, 1996, which is treated as a petition to set aside the judgment rendered herein on the 20th day of December, 1995 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy

Teste:

/S/ David Beach

Clerk

United States Bankruptcy Court
For the Eastern District of Virginia
Alexandria Division

IN RE: CHARLES E. ROGERS, JR.:	
Debtor	Bankruptcy No. 90-11614-AB
WALTER M. ROGERS, ET AL.	
Plaintiffs,	Adversary Case No. 90-1260
v.	
CHARLES E. ROGERS, JR.	
Defendant.	
WALTER M. ROGERS, ET AL.,	
Plaintiffs	Adversary Case No. 90-1261
v.	
CHARLES E. ROGERS, JR.	
Defendant.	

ORDER

THIS MATTER having come before this Honorable Court for trial on June 6 and 7, 1991, and upon the presentation of evidence and argument of counsel, and a decision having been reached by the Court on the merits, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff's First Amended Complaint to Determine Dischargability, Case No. 90-

01261 and all Counts set out therein regarding Plaintiff's loan of $348,000 to the Defendant, is determined to be not well-founded and said debt is discharged, and it is further

ORDERED, ADJUDGED AND DECREED that Counts One, Three, Four and Five of Plaintiffs' First Amended Complainant to Determine Dischargability, Case No. 90-01260, regarding the alleged entrustment of $165,000 of Plaintiffs' funds to the Defendant, is not well-founded, and it is further

ORDERED, ADJUDGED AND DECREED with regard to Case No. 90-01260 that Count Two, Defalcation in a Fiduciary Capacity, is well-founded and it is determined that the Plaintiffs entrusted the Defendant with $145,000 of their funds, that the Defendant was acting in a fiduciary capacity when he received said monies, that he unlawfully and wrongfully, disposed of or converted said funds by co-mingling and failing to properly account for said entrusted funds, that the Defendant failed to return any of the funds to the Plaintiffs after demand for said monies was made, and that there is now due and owing by the Defendant the sum of $145,000, not the $165,000 stated in the Plaintiffs' Amended Complaint.

Entered this 13th day of November 1991.

/S/ Martin V. B. Bostetter, Jr.
Martin V. B. Bostetter, Jr.,
Chief Judge

I ASK FOR THIS

/S/ Charles B. Roberts, Esquire
Charles B. Roberts, Esquire
ROBERTS & WEISS
12620 Lake Ridge Drive
Woodbridge, Va 22192
V.S.B. No. 26855
Counsel for Plaintiffs

SEEN AND Objected to insofar as:

1. Insufficient evidence of defalcation
2. No defalcation or wrongful co-mingling of funds or failure to properly account for funds
3. Defendant acted...as Plaintiffs agent and...as per instructed
4. All valid objections as made by Defendant at the trial of this matter and all other motions made before this court

NOTICE OF JUDGMENT OR ORDER Entered on Docket Nov. 19, 1991

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-2254

CHARLES EDWARD LEE ROGERS,

Plaintiff - Appellant,

versus

WALTER M. ROGERS, JR.; RONALD A. ROGERS; ROGERS BROTHERS, INCORPORATED,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge. (CA-93-489-A)

Submitted: January 24, 1995
Decided: April 19, 1995

Before HALL, WILKINSON, and WILLIAMS, Circuit Judges.

Affirmed by unpublished per curiam opinion

Charles Edward Lee Rogers, Appellant Pro Se. Charles Bren Roberts, ROBERTS & WEISS, Woodbridge, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Charles E. Rogers, Jr. appeals from the district court's order affirming the bankruptcy court's orders (1) denying his motion for a continuance of the scheduled trial date; and (2) finding that he committed a defalcation while acting in a fiduciary capacity, within the meaning of 11 U.S.C. Sec. 523 (a) (4) (1988), rendering his $145,000 debt to the Appellees nondischargeable in bankruptcy. Our review of the record, including transcripts of the hearings before the bankruptcy court on both issues, reveals that his appeal is without merit. Accordingly, we affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process. In light of this decision, the Appellant's motion to expedite the appeal is denied as moot.

AFFIRMED

The Appellees have filed a Motion to Close the Record of Appeal which we hereby deny.

THIRTY-FIRST JUDICIAL CIRCUIT OF VIRGINIA
Prince William County
Cities of Manassas and Manassas Park

Chambers of
William D. Hamblen
Judge

May 3, 1995

H. Jan Roltsch-Anoll, Esquire
Compton & Duling, L.C.
14914 Jefferson Davis Highway
Woodbridge, VA 22191
Counsel for Complainants

Bryant A. Webb, P.C.
4300 Ridgewood Center Drive
Woodbridge, VA 22192
Counsel for Defendant Charles Rogers

Thomas R. Breeden, Esquire
7900 Sudley Road, Suite 301
Manassas, VA 22110
Counsel for Defendants NSA and ASA

Anthony W. McLaughlin, Esquire
10603 Judicial Drive
Fairfax, VA 22030
Counsel for Defendant Eleanor Rogers

Re: Walter M. Rogers, Jr., et al. v.
Charles Edward Lee Rogers, et al.
Chancery No. 33841

Dear Counsel:

Upon review of the evidence presented during the trial held in this cause, together with the parties post-

trial submissions, I have reached the following findings and conclusions which I think are largely dispositive of the issues raised in this litigation.

FINDINGS OF FACT

The parties entered into some twenty-six detailed stipulations of fact prior to the trial held herein. While the admission of some of these stipulated facts was at trial the subject of objection, all such objections were overruled. Accordingly, these stipulations should, were utile, be considered as part of the factual underpinning for the decisions reached herein.

Additionally, the complainants were successful in establishing, inter alia, by evidence that was both clear and convincing, those factual assertions contained within their Proposed Findings pertaining to Count One A through M, inclusive, and O through R, inclusive. The evidence presented at trial also established those assertions contained within their Proposed Findings pertaining to Count Two F,I,J,K,L,M.P,R, and S. Finally, the evidence established those additional assertions contained in Proposed Findings B,C,F,G, and H relating to Count Three.

One central issues of fact not yet addressed is the value of the stock in National Sportsman Association, Inc. (hereinafter "NSA") at the time of its transfer to Eleanor Rogers. While the

complainants failed to establish with the requisite degree of certainty that it was worth in excess of $294,000 as they asserted at trial, any reasonable view of the evidence yields the unalterable conclusion that it was worth a substantial amount, an amount closer to $294,000 than $10.00. Hence, the consideration paid for the stock by Eleanor Rogers in July 1990, can only be characterized as having been grossly inadequate.

With respect to Court Four, the evidence failed to establish with sufficient certitude the quantum of damages resulting from conspiracy therein alleged. Counsel advanced various measures of damages in her pleading and argument. None of them, in my view, was sufficiently buttressed by the evidence in this record to allow for further consideration; the application of any of them would require speculation.

In connection with the process of making factual findings, it is appropriate to comment on credibility of witnesses, specially that of Charles and Eleanor Rogers. The record of this proceeding is replete with instances in which both were successfully impeached on material points of their testimony. Similarly, the transcript of the trial will, upon examination, be found to be rife with examples of attempts by both to contradict or diminish the import of the concededly-accurate written record of their business dealings, this effort being clearly designed to leave an

impression of their intent and actions which is wholly at odds with what the bulk of the credible evidence establishes to have been reality.

With respect to Count One of the Bill of Complaint, the evidence clearly established that the transfer of the stock of NSA to Eleanor Rogers in July 1990 was the product of the shared intent of Eleanor and Charles Rogers to hinder, delay or defraud his creditors. It was of course a transfer between family members, a factor which would have been worthy of note in any evidentiary context, but is even more significant here, given Charles' historically dominant role in this closely held corporation. This transfer was effected at a time when Charles was being pursued by creditors and had filed seeking relief from the bankruptcy court. The protestations of Charles and Eleanor at trial that they expected the bankruptcy to result in a discharge of all debts, including the Rogers Brothers debt and hence had no motive to attempt to shield the corporation are, when viewed in the context of the credible evidence in this case, unpersuasive. Moreover such a conclusion is specifically belied by many of the defendant Charles' actions, such as his inclusion of the ostensibly worthless NSA stock on the homestead deed he caused to be filed.

Much of the evidence produced during the trial went, directly or not, to the issue of the value of the corporation which was the subject of this transfer.

As stated above, I view the complainants' specific trial assertion that its worth exceeded $294,000 at the time of transfer to be unproven. Nevertheless, the evidence compels the conclusion that the worth of this corporation well exceeded the price Eleanor paid for it and was in fact closer to the value claimed by the complainants than that asserted by the defendants. Hence, the consideration paid therefore was grossly inadequate and in fact a sham. Any analysis of the worth of this corporation must, in my view, necessarily take into account its income-producing potential and history, both of which the defendant Charles had, at various times during the events preceding this trial, acknowledged to have been substantial.

In a similar vein, the evidence established that Charles Rogers retained a substantial de facto interest in the corporation after the transfer of its stock to his wife. It was established beyond cavil that the defendants drew in excess of $200,000 from the corporation post transfer. While the bulk of those funds went ostensibly to Mrs. Rogers, it is reasonable to infer that Charles benefitted at least indirectly therefrom. Moreover, in the context of his history of starting and operating this entity for some fifteen years preceding the transfer herein complained of, it is also a reasonable inference, his protestations to the contrary notwithstanding, that Mr. Rogers continued after the transfer to exert control over corporate affairs.

The conduct complained of in Count Two of the Bill of Complaint is conceptually of a piece with the transfer of NSA stock to Eleanor Rogers, and, properly viewed, can be seen to be, like the NSA transfer, to be a clear manifestation of the Rogers' shared intent to shield the flow of corporate income from the demands of Charles Rogers' creditors. Again, this was a transfer between related entities, for little or no consideration, effected by Eleanor Rogers at a time when she was fully cognizant of her husband's financial difficulties. Her articulated reasons for organizing the new corporation, American Sportsman Association, Inc. (hereinafter "ASA") were, in my view, unpersuasive. Similarly, the manner in which funds belong to NSA were transferred to the new corporation bespeak an intent on her part to create yet another barrier between what she and her husband both obviously expected to be a continuing stream of income, and his creditors. The evidence also established that they were, in the final analysis, successful in this attempt, having drawn from one or the other corporations in the thirty-eight months following July, 1990, transfer a sum in excess of $200,000.00.

The remedy available to the complainants is, in part at least, clear enough. The transfer of corporate stock to Eleanor in July, 1990 should be acknowledged to have been a device to defraud or delay the complainants and, as such, set aside. For the same or similar

reasons, the purported conveyance of NSA assets to ASA should likewise be disregarded, the cumulative net effect of this being to place the stock of NSA back into the hands of Charles Rogers as an asset against which his creditors might seek to proceed. This does not, however, end the inquiry, but does lead to the final issue to be resolved, that being the liability of Eleanor Rogers as the transferee of these assets.

In Price v. Hawkins, 247 Va. 32 (1994), the Supreme Court addressed the entry of in personam judgements by the trial court against transferees who were, like Mrs. Rogers, witting participants in a debtor's attempts to shield assets. Against the background of its previous seemingly broad-gaged prohibition of same in Mills v. Miller Harness Company, 229 Va. 155 (1985), the Court in Price refined that holding, identifying a number of factors which in its view justified the entry of in personam judgments against transferees of this sort.

First, the Court contrasted the transferees in Price with those in Mills and Darden v. George G. Lee Co., 204 Va 108 (1963), noting that the former group were not legitimate preexisting creditors of the sort preferred in Mills and Darden. Rather, the Price transferees had merely "joined [the debtor] in assisting him in hiding assets that the creditor otherwise would have reached in his judgment collection efforts", Price, 247 Va. at 37. Mrs. Rogers clearly

qualifies under the evidence as a Price category transferee. Her assertions at trial that she was a long term preexisting creditor of NSA and that the bulk of the distributions to her post-transfer represented repayment of loaned funds or deferred compensation were disingenuous and unsupported by any credible evidence.

The next factor considered by the Price court was the nature of the property which had been the subject of the fraudulent transfer. The Court noted that types of property - real property and tangible chattels for instance - could be ordered reconveyed, compliance with such a decree being subject to being both monitored and enforced by the trial court. Contrasting that with the case there at bar, the Court in Price observed that transferees of cash could defeat the entire process by refusing to return the money transferred or maintaining that it had been spent. Noting that equity "will not suffer a wrong to be without a remedy", the Court observed that "[a] mere declaration under Section 55-8- that the cash transfers are 'void' is meaningless in terms of relief to the defrauded creditor in this case", Price, 247 Va. at 37, ultimately affirming the trial court's action in awarding in personam judgements against the transferees.

Much if not all the property which was the subject of the fraudulent transfer here partook of many of the operative characteristics of cash,

principally in that a simple order of reconveyance of, for instance the stock of NSA, would be a largely empty remedy, given the nature of the corporation and the business it conducts. Additionally, such a result would ignore the receipt by Eleanor Rogers of $200,000 between July 1, 1990 and September, 1993, as the evidence established. This sum represents the proceeds of the assets the subject of the fraudulent transfer; Eleanor Rogers should, in equity be made to disgorge same. Failing that, a judgment should be entered against her in that amount as part of the relief to which complainants herein are entitled.

Counsel for the complainants will please prepare and circulate a Final Decree in conformance with the above and present it for entry when endorsed.

Very truly yours,

/S/ William D. Hamblen
WILLIAM D. HAMBLEN

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE WILLIAM

WALTER M. ROGERS, JR., et al.,	)	
	)	
Complainants,	)	
	)	
v.	)	CHANCERY
	)	NO. 33841
CHARLES EDWARD LEE ROGERS, et al.,	)	
	)	
	)	
Defendants.	)	

FINAL DECREE

THIS CAUSE came before the Court on April 11th, 12th and 13th, 1995, whereupon the Court conducted a full *ore tenus* hearing on the merits; and

IT APPEARING to the Court that the following facts were either contained in the record or proven at trial by clear and convincing evidence, the Court hereby adopts the following as its findings of facts as to Counts I,II,III and IV of the Second Amended Bill of Complaint:

1. Prior to July 1, 1990, Charles Rogers owed to the Complainants a debt in the amount of $475,000.

2. Prior to July 1, 1990, the Complainants were pursuing Charles Rogers with legal action for the collection of their debt.

3. For 15 years prior to July 1, 1990, Charles Rogers was the owner of 100% of the shares of stock in the Virginia corporation, National Sportsman Association, Inc. ("NSA").

4. Charles Rogers received $55,000.00 in director's fees from NSA in the fiscal year prior to July 1, 1990.

5. Prior to July 1, 1990, Charles Rogers' wife, Eleanor Rogers, knew the Complainants were pursuing Charles Rogers for payment of the debt owed by Charles Rogers to the Complainants.

6. For over two years prior to July 1, 1990, NSA produced a steady stream of income available to the principals.

7. Within six months prior to July 1, 1990, Charles Rogers had projected profits to be received from NSA for fiscal years ending 6/30/90 and 6/30/91, evidencing that Charles Rogers anticipated NSA to remain profitable and to continue to generate a stream of cash flow to principals in the future.

8. On June 28, 1990, Charles Rogers filed a Chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the Eastern District of Virginia and listed the Complainants as creditors on an unsecured debt in the amount of $475,000.

9. On June 28, 1990, Charles Rogers listed his interest in NSA as having a value of $10.00 on his Chapter 7 Bankruptcy petition.

10. On July 1, 1990, Charles Rogers transferred his ownership interest in NSA to his wife, Eleanor Rogers, in exchange for a payment of $10.00.

11. On November 13, 1991, the U.S. Bankruptcy Court for the Eastern District of Virginia entered an order on nondischargeability of $145,000 of the Complainants' debt, which has remained unpaid to the time of this trial.

12. On July 1, 1990, NSA had two main assets; a customer list developed and established over a period of 15 years and a list of landowners willing to lease real property to the corporation for use by its customers.

13. The steady stream of cash flow produced by NSA's two assets continued, uninterrupted, following the transfer of ownership of the entity on July 1, 1990 and was consistent with Charles Rogers projection of profits as set forth in Complainants Exhibit 12.

14. On July 1, 1990, Charles Rogers knew NSA had a value in excess of $10.00.

15. Charles Rogers continued to be responsible for all financial aspects of the operation of NSA following the time of the transfer.

16. Charles Rogers continued to write and sign the majority of the corporate checks drawn on the account of NSA and made payable to himself and his wife, Eleanor Rogers, following the time of

transfer on July 1, 1990. Charles Rogers continued to provide services to NSA and received financial benefits from NSA following the time of transfer of ownership.

17. Charles continued to exert control over corporate affairs following the time of the transfer and continued to benefit, at least indirectly, from the corporations post-transfer.

18. On July 1, 1990 NSA had a substantial value, far in excess of $10.00 such that the consideration paid by Eleanor Rogers in exchange for ownership of NSA was grossly inadequate and in fact a sham.

19. On June 26, 1990, Eleanor Rogers opened the Sovran Checking Account number 7919-0051 under the name of American Sportsman Association, Inc., ("ASA").

20. On July 3, 1990, ASA was incorporated.

21. Following July 1, 1990 through the filing of this cause, NSA and ASA were both wholly owned by Eleanor Rogers, had identical directors and officers, and were related entities.

22. Beginning on July 6, 1990 and continuing for a year thereafter, NSA customer checks were exclusively deposited to the books and records of ASA.

23. There was no showing of consideration paid to NSA for ASA's receipt of NSA assets.

24. Following July 1, 1990, and for one year thereafter, NSA ceased operating through its own accounts and records and all customers' funds received by NSA were transferred to the books and accounts of ASA

25. From the time of ASA's incorporation on July 3, 1990 through September 30, 1993, ASA's corporate bank account was used by NSA for the purpose of processing NSA customer income through the books and records of ASA.

26. From the time of ASA's incorporation on July 3, 1990 through September 30, 1993, ASA's corporate bank account operated under the Federal Tax Identification number which appears on the NSA corporate Federal Tax returns as the Federal Tax Identification number of NSA.

27. From the time of ASA's incorporation on July 3, 1990 through September 30, 1993, Eleanor Rogers used ASA's bank account and NSA's bank account interchangeably, and saw no difference in the use of either entities' account.

28. From the time of ASA's incorporation on July 3, 1990 through September 30, 1993 ASA had no separate purpose other than to act as an agent for the receipt and processing of funds payable to NSA.

29. Charles Rogers continued to be responsible for all financial aspects of the operation of ASA following the transfer.

30. Charles Rogers continued to write and sign the majority of the corporate checks drawn on the account of ASA and made payable to himself and his wife, Eleanor Rogers, following the time of transfer on July 6, 1990.

31. The testimony of Charles and Eleanor Rogers at trial was wholly at odds with what the bulk of the credible evidence establishes to have been reality.

32. Complainants failed to establish with sufficient certainty the quantum of damages resulting from the conspiracy alleged in Count IV.

33. Eleanor Rogers was a witting participant in Charles Rogers' attempts to shield his assets from creditors.

34. Much, if not all, of the property which was the subject of transfer between Charles Rogers and Eleanor Rogers herein partook of many of the operative characteristics of cash.

35. Eleanor Rogers received $200,000 as distributions from NSA and/or ASA between July 1, 1990 and September of 1993; it is therefore

ADJUDGED, ORDERED AND DECREED that:

1. With respect to Count 1, the evidence clearly established that the transfer of stock of NSA to Eleanor Rogers on July 1, 1990 was the product of the shared intent of Eleanor and Charles Rogers to hinder, delay or defraud the Complainants as creditors of Charles Rogers and as such, is hereby deemed void and set aside such that shares of stock which constituted 100% ownership of NSA and which were transferred to Eleanor Rogers on July 1, 1990 are hereby deemed to be solely owned by Charles Rogers and subject to the rightful demands of Complainants as his creditors.

2. With respect to Counts II and III, the transfer of NSA assets into the newly created entity, ASA, by Eleanor Rogers following July 1, 1990 and continuing was a clear manifestation of the Rogers' shared intent to shield the flow of corporate income of NSA from the demands of Complainants as creditors of Charles Rogers by creating yet another barrier between the creditors and the continuing stream of income of the corporation. This transfer was an additional device to defraud or delay the Complainants as creditors of Charles Rogers and as such is deemed void and hereby set aside such that the assets of ASA are deemed to be assets of NSA.

3. With respect to Count IV, the relief requested by Complainants is denied.

4. The Complainants are awarded judgment against Eleanor Rogers in the amount of $200,000 (Two Hundred Thousand dollars) with interest at the statutory rate from the date of entry of this Decree.

5. The Complainants are granted relief from the Protective Order entered by this Court on March 4, 1994, in that Counsel for Complainants is not required to destroy any documents subject to the Protective Order which contain information relating to NSA's and/or ASA's customer lists, bank accounts and other assets, provided however, that Counsel for the Complainants shall not disclose any information in such documents to any third party, including the Complainants, unless or until the Complainants, or any one of them, become owners of NSA as a result of collection actions, or otherwise; or should a court appoint a receiver for either NSA or ASA then disclosure is authorized to the appointed receiver upon request; or pursuant to a subsequent order of court..

ENTERED THIS 9 DAY OF JUNE, 1995.

/S/ William D. Hamblen
The Honorable William D. Hamblen, Judge
Prince William County Circuit Court

WE ASK FOR THIS:
COMPTON & DULING, L.C.
14914 Jefferson Davis Highway
Woodbridge, Virginia 22191
(703) 790-6800
Counsel for Complainants

By: /S/ H. Jan Roltsch-Anoll
H. Jan Roltsch-Anoll
VA State Bar # 29690

SEEN AND OBJECTED TO:

1) On all grounds stated in open court during trial of this matter and upon all pre-trial motions;

2) Per the In re Green doctrine, i.e. this matter was waived per failure to address in bankruptcy court;

3) That plaintiffs did not pray for the relief granted;

4) That there is insufficient evidence to support the relief granted;

5) That plaintiffs' claims are barred by the doctrines of res judicata and collateral estoppel;

6) That the state court is without jurisdiction to hear this matter;

7) All grounds to be stated in the motion for reconsideration to be filed herein;

8) Granting relief from the protective order as it violates bankruptcy law and same is improper as requested;

9) A judgment against Eleanor is not supported by the law or the facts;

10) There is no sufficient evidence to support.

BRYANT A. WEBB, P.C.
4300 Ridgewood Center Drive
Woodbridge, Virginia 22192
Counsel for Charles E. L. Rogers

By: /S/ Bryant A. Webb
Bryant A. Webb

SEEN AND OBJECTED TO: (Same grounds as stated by Charles Rogers)

/S/ Thomas R. Breeden
THOMAS R. BREEDEN
7900 Sudley Road, Suite 301
Manassas, Virginia 22110
Counsel for Defendants NSA and ASA

SEEN AND OBJECTED TO: Same grounds as stated by Charles Rogers

/S/ Anthony W. Mclaughlin
ANTHONY W. McLAUGHLIN, P.C.
10603 Judicial Drive
Fairfax, Virginia 22030
Counsel for Defendant Eleanor Rogers

HOMESTEAD DEED
FOR REAL AND PERSONAL PROPERTY

HOUSEHOLDER: Charles ROGERS

ADDRESS OF HOUSEHOLDER: 3916 Forge Drive
Woodbridge, VA
22193

COUNTY OF HOUSEHOLDER: Prince William
County

DEPENDENTS: one son, age 12

Property claimed as exempt under the Code of Virginia, 1950, 34-26, as amended:

bed	$50.00
loveseat	30.00
sofa	50.00
dresser	50.00
TV	50.00
professional books	150.00
computer, printer, monitor & software	1100.00
Typewriter	50.00
desks & chairs	200.00
file cabinets	50.00
2 adding machines	20.00
all necessary wearing apparel	200.00
equity in 1986 Isuzu Trooper	1473.00

Property claimed as exempt under the Code of Virginia, 1950, 34-4 and 34-29, as amended:

1990 Federal withholding tax	$10.00
1990 State withholding tax	10.00

Cash on deposit:	
Nat'l Bank of Washington	40.00
Nat'l Bank of Washington	15.00
Waterhouse Securities	55.00
Charles Schwab & Co.	29.00
Charles Schwab & Co.	1301.00
York Securities	43.00
York Securities	1424.00
books	50.00
watch	10.00
bracelet	50.00
winchester rifle	100.00
colt pistol	100.00
1965 Ford Falcon	10.00
accounts receivable from Rogers Brothers, Inc.	1500.00
100% interest in NSA, Inc.	10.00
TOTAL HOMESTEAD EXEMPTION FOR 34-4 and 34-29	$4857.00

WITNESS the following signature and seal this 19th day of July, 1990.

/S/ Charles E. L. Rogers

STATE OF VIRGINIA
COUNTY OF PRINCE WILLIAM, to-wit:

I, Margaret S. Hawk, a Notary Public of and for the County and State aforesaid, in the State of Virginia, do certify that Charles Rogers whose name is signed to the foregoing writing dated July 19 1990, has acknowledged the same before me in my County.

/S/ Margaret S. Hawk
Notary Public

My commission expires: November 4, 1990

EXCERPT FROM U. S BANKRUPTCY COURT FORM

SCHEDULE B-2-PERSONAL PROPERTY (CONT.)

Type of Property	Description and location	Market Value
Contingent, unliquidated claims of every nature	Accts. Rec'ble due from Rogers Brothers, Inc.	$17,743.00
Interests in insurance policies	None	0.00
Annuities	None	0.00
Interest in partnership	None	0.00
Stock and interests in incorporated companies	100% interest in NSA, Inc. - Liabilities exceed assets	10.00
Interests in partnerships	None	0.00
Equitable and Future Interests	None	0.00
Total		$17,753.00

EXCERPT FROM U. S BANKRUPTCY COURT FORM

SCHEDULE B-4-PROPERTY CLAIMED AS EXEMPT

Debtor selects the following property as exempt pursuant to the laws of the State of VIRGINIA

Type of Property	Description and location	Market Value
real property	See sch B-1	$23,460.00
cash on hand	See sch B-2	50.00
deposits	See sch B-2	2,907.00
household goods	See sch B-2	180.00
books	See sch B-2	200.00
wearing apparel, etc	See sch B-2	560.00
automobiles	See sch B-2	1,483.00
office equip	See sch B-2	1,420.00
tangible personal property	See sch B-2	50.00
contingent claims	See sch B-2	1,500.00
stocks	See sch B-2	10.00
property not otherwise sch	See sch B-3	20.00
liquidated debts	See sch B-2	45.00
Total		$31,885.00

PERTINENT TEXT OF 11 U.S.C. §522(b):

(b) Not withstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.

FULL TEXT OF 11 U.S.C. §522(c):

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 if this title as if such debt had arisen, before the commencement of the case, except -

(1) A debt of a kind specified in section 523(a)(1) or 523(a)(5) of this title;

(2) A debt secured by a lien that is -

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(a) of this title; or

(B) a tax lien, notice of which is property filed; or

(3) A debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

ROBERTS & WEISS
Attorneys at Law
12620 Lake Ridge Drive
Woodbridge, VA 22192

January 7, 1992

Mr. Robert Tyler, Interim Trustee
Tyler, Bartle, Burke & Albert
300 N. Washington Street
Suite 500
Alexandria, VA 22314

Re: Walter Rogers, Jr., et. al., v. Charles Rogers: Adversary Case Nos. 90-1260 and 90-1261-AB; Bankruptcy Case No. 90-11614-AB

Dear Mr. Tyler:

I represent Walter and Ronald Rogers and Rogers Brothers, Inc. creditors in the above-referenced bankruptcy case. The no-asset Chapter 7 case was filed by Charles E. L. Rogers on June 28, 1990. By way of background, the creditor's claim $548,000 from two transactions with the Debtor -- a loan of $348,000 --- which the Debtor states was subsequently "lost" in risky options trading within six months of the loan. Around the same time, the creditors entrusted $200,000 to the Debtor for the purchase of specific stock certificates which the debtor illegally converted to his own use and "lost" in options trading.

In October 1990, the creditors filed two adversary actions stemming from the above transactions, and on June 7, 1991

Judge Bostetter, Jr. found the Debtor guilty of defalcation in a fiduciary duty and embezzlement and declared $145,000.00 of the "entrustment" non-dischargeable. Both cases are now on appeal.

Judge Bostetter's ruling, after a two-day trial, confirms what the creditors suspected of this Debtor -- that he lacks integrity -- to put it mildly. During discovery in the adversarial proceedings herein, it was discovered that the Debtor transferred all the stock he owned in the National Sportsman Association, Inc. a "hunting club," to his wife and son immediately after filing his Chapter 7 bankruptcy petition. When the debtor filed his bankruptcy petition on June 28, 1990, he owned 100% of the stock in the National Sportsman Association, Inc., (NSA) and he listed the value of the stock as being worth $10.00, which he claimed as exempt on his homestead deed. He also listed the income for NSA, Inc. on his bankruptcy petition as zero on grounds that it was not operational Exhibit 1.

It is now evident that NSA is worth far in excess of $10.00 extremely valuable asset which should have been sold for the benefit of the creditors in this Chapter 7 case. The following evidence generated during the adversarial proceedings is presented to you to support our claim:

Exhibit 1a. Homestead Deed

Debtor claims NSA stock is worth $10.00 and on July 19, 1990 declares it exempt.

Exhibit 2. Bankruptcy Petition -Schedule B-2, item T

Debtor's 100% interest in NSA valued at $10.00.

Exhibit 3. Deposition testimony of Debtor, Charles Rogers

Debtor testified that NSA was transferred to his wife and son post-petition for the sum of $10.00 in June of 1990. Pages 149, 150, 151.

Exhibit 4. Debtor Charles Rogers Adversarial Proceeding - Exhibit 29. Tax returns for NSA for fiscal years July 1, 1986, to June 30, 1987; July 1, 1987 to June 30, 1988; July 1, 1988 to June 30, 1989.

In fiscal year 1986-1987, NSA's gross revenues were $67,245.00 and the net income was $10,764.00. NSA distributed income to the Debtor in the amount of $10,367.00, and in addition NSA made payments to the Debtor to offset his costs operating his joint CPA practice/NSA office space.

For fiscal year 1987-1988, NSA gross revenues increased to $87,349.00, and net profit was $12,222.00. In addition, NSA paid the Debtor a $25,000 salary for

serving as a Director of the Corporation. Substantial payments were made by NSA to the Debtor to offset the costs of shared office space with Debtors CPA practice. The asset value of the Corporation increased from a 1987 value of $92,820.00 to $105,042.00 at the end of fiscal year 1988.

For fiscal year ending June 30, 1989, NSA revenues increased to $107, 318.00 but net profit fell to $4,173.00 because the Debtor was paid $55,000.00 in Director's fees which was declared as an expense against NSA gross revenues.

Exhibit 5. Deposition of Debtor

Charles Rogers testified that as of March 20, 1991, he had not prepared NSA tax returns for fiscal year ending June 30, 1990, nor had he asked for an extension from the IRS and was in total "default" in this regard. Therefore he could not produce any tax documents to demonstrate how he arrived at "zero" income for NSA when he filed his bankruptcy schedule on June 28, 1990. Deposition pages 73, 74, 75, and 145.

Debtor testified that he kept no financial records for NSA but used "brown bag" accounting instead to arrive at his conclusion that NSA was worth only $10.00 when he filed his petition. Deposition pages 56, 57, and 58.

Exhibit 6. Deposition of Debtor's Wife, Eleanor Rogers

Mrs. Rogers testified that she became the owner of NSA "around June 1990," and that the Debtor and her operated NSA for eighteen years prior thereto. Pages 12, 13, and 14. She stated further that she paid $10.00 for NSA when her husband transferred it to her. Page 56.

With regard to the financial condition of NSA around June of 1990, and thereafter, Mrs. Rogers testified that NSA was still operational when she acquired ownership, that revenues had only declined by one-third since June 1990 when the Debtor filed his petition, and that in the previous fiscal year the Debtor earned $55,000 as a director of NSA. Pages 12, 13, 14, 22, 23, and 24.

Exhibit 7. Net Profits and Profit Projections for NSA for Years 1986, 1989, 1990, 1991.

On April 24, 1990, Charles Rogers projected profits for NSA for fiscal years ending June 30, 1990 and 1991, at $26, 854.00 and $23,354 respectively. The Debtor prepared these projections and voluntarily submitted the information to the Rogers Brothers in April of 1990, two months before he listed NSA's as "zero" on his bankruptcy petition. See attachment.

In summary, the above evidence generated by the Rogers Brother's in their adversarial proceedings herein demonstrate the high probability that the

Debtor has filed a "false oath" in his bankruptcy case and has engaged in a post-petition transfer of valuable property of the estate to his wife and his son for substantially less than the NSA's true income-generating value.

Accordingly, as unsecured creditors in excess of $500,000, the Rogers Brothers request that the Trustee in this case take appropriate action under Section 549 of the Bankruptcy Code to avoid this transfer and to recover NSA for the benefit creditors. In addition, we suggest the Trustee should proceed against the Debtor under Sections 727 (a) (2), 727 (a) (3), and 727 (a) (4), for the entry of an Order denying the Debtor a discharge for falsifying his bankruptcy petition, failing to keep appropriate records, and for fraudulently transferring the NSA stock to his wife and son post-petition.

Your assistance and cooperation is greatly appreciated. I am available to discuss this matter in greater detail prior to your response.

Very truly yours,

ROBERTS & WEISS

/S/ Charles B. Roberts
Charles B. Roberts, Attorney at Law
Counsel for Rogers Brothers, Inc.
CBR/mar
cc: Walter Rogers, Jr.
Charles Rogers
Clerk, U.S. Bankruptcy Court

TYLER, BARTL, BURKE & ALBERT
Attorneys and Counselors at Law
300 North Washington Street
Alexandria, VA 22314

February 16, 1992

Charles B. Roberts
Roberts & Wise
Lakeridge Executive Park
12620 Lakeridge Drive
Woodbridge, Virginia 22192

Re: Charles Edward Lee Rodgers
Case No. 90-11614-AB

Dear Chuck:

Thank you for responding to my letter of January 23, 1992.

Based on the factors we discussed, i.e., that the parties are related and that the possibility of recovering anything for general unsecured creditors from an action to set aside the transfer of the Hunting Club is speculative, in the exercise of my Trustee's business judgement, I elect not to revoke my no asset report dated August 3, 1990, and disclaim any interest in the Hunting Club and the possible cause of action to recover it.

I understand that your clients have obtained a judgement of non-dischargeability as to most of their claims, and that they intend to proceed on their own to recover this, and any other available asset.

Best regards,

Sincerely yours,

/S/ Bob
Robert O. Tyler

ROT/emh

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
CHARLES E. ROGERS	)	Case No. 94-14656-AM
	)	Chapter 13
Debtor	)	

MEMORANDUM OPINION

The Court has received a letter from the debtor dated February 17, 1995, and received and filed on February 22, 1995, requesting reconsideration of the Court's "decision, rendered on February 14, 1995." The letter was accompanied by two lengthy memoranda, one entitled "Memorandum in Opposition of Motion to Dismiss Case" and the other "Memorandum in Opposition of Motion for Relief from the Automatic Stay".[1] The Court treats the letter and supporting memoranda as motions under Fed.R..Bankr.P. 9029 and Fed.R.Civ.P.59(e) to alter or amend the orders dated February 14 and 17, 1995, respectively, granting relief from the automatic stay and denying confirmation of the debtor's chapter 13 plan[2]

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[1]Neither the letter nor the memoranda appear to have been served on opposing counsel or the chapter 13 trustee

[2]Both rulings were announced from the bench on February 14, 1995. The order granting relief from the automatic

The debtor, a certified public accountant, filed a chapter 13 petition and plan on December 8, 1994. He had previously filed a chapter 7 petition in 1990, in the course of which a judgment of nondischargeability under 11 U.S.C. Sec. 523(a)(4) was entered against him in the amount of $145,000.00 in favor of Walter M. Rogers, Jr., Ronald A. Rogers and Rogers Brothers, Inc., based on a finding of defalcation while acting in a fiduciary capacity. That judgment was affirmed by the United States District Court and is currently on appeal before the United States Court of Appeals for the Fourth Circuit.

Among the assets listed on his schedules, and claimed as exempt, in the chapter 7 case, was his stock, which he valued at $10.00, in a corporation called the National Sportsman Association, Inc. No objection was filed to the claim of

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stay was signed that same day and entered on the docket February 23, 1995. The order denying confirmation of the chapter 13 plan was signed on February 17, 1995, and entered on the docket February 22, 1995. Under Fed.R.Bankr.P. 9021 a judgment in an adversary proceeding or contested matter is effective when it is entered on the docket. A motion to alter or amend a judgment must be filed not later than 10 days after entry of the judgment. Fed.R.Civ.P 59(e). Accordingly, the debtor's request, albeit defective in form and not properly served, is timely.

exemption.[3] Shortly after the chapter 7 petition was filed, the debtor transferred the stock to his wife. She subsequently formed a corporation known as the American Sportsman Association, Inc. and allegedly transferred the assets of the old corporation to the new corporation.

The creditors who obtained the nondischargeability judgment unsuccessfully sought to have the chapter 7 trustee pursue the stock interest. After the chapter 7 case was closed, they brought a fraudulent conveyance action against the debtor, his wife and the two corporations in the Circuit Court of Prince William County, Virginia. The case is currently scheduled for trial on April 10, 1995. Count 1 of the bill of complaint seeks to set aside the transfer of the National Sportsman Association stock from the debtor to his wife and to subject the assets of the corporation to

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[3]None of the counts in the two adversary complaints filed by the judgment creditors in the chapter 7 case expressly focused on the value of the stock. The debtor's testimony reflected that he valued the stock using a balance sheet (liquidation) methodology rather than a going-concern analysis, even though the corporation paid the debtor some $55,000 in directors fees in the year prior to the chapter 7 filing. In any event, the court made no finding as to the value of the stock in connection with the nondischargeability litigation.

the payment of the nondischargeability judgment. Count II seeks to set aside the transfer of the National Sportsman Association assets to the American Sportsman Association. Count III seeks to pierce the corporate veil with respect to the two corporations and to treat their assets as assets of the debtor for the purpose of satisfying the nondischargeability judgment. Finally, Count IV seeks an award of compensatory and punitive damages against the debtor and his wife for an alleged conspiracy to defraud the complainants by transferring assets and diverting income.

On April 4, 1994, the debtor filed a chapter 13 petition. He took the position that, because the nondischargeability judgment was on appeal, the $145,000 judgment did not count against the $100,000 unsecured debt limitation then applicable to chapter 13 cases under 11 U.S.C. Sec. 109(e). Bankruptcy Judge Douglas O. Tice, Jr. ruled that it did and dismissed the case on August 19, 1994. After the passage on October 22, 1994 of the Bankruptcy Reform Act of 1994, which raised the debt ceiling in chapter 13 cases to $250,000.00 unsecured and $750,000.00 secured, the debtor filed the current chapter 13 case.

In the current chapter 13, the debtor's plan proposed to continue the regular monthly payments on the two mortgages against his house (neither of which was in arrears) and to pay $300 a month for 36 months on account of the

unsecured claims--resulting in a dividend of seven cents on the dollar. The only unsecured claims were the $145,000 judgment and two claims for attorney fees totaling $6,292.

Both the chapter 13 trustee and the judgment creditors objected to confirmation of the plan. In addition, the judgment creditors filed a motion for relief from the automatic stay in order to pursue the fraudulent conveyance suit in state court and a motion to dismiss the chapter 13 case. The court, in reviewing the file prior to the hearing, noted that debtor's counsel was the law partner of the trustee in the chapter 7 case and questioned the propriety of the representation. At a hearing on February 14, 1995, debtor's counsel expressed the view that there was no actual conflict, but that, in the interest of avoiding even the appearance of propriety, he would assist the debtor in obtaining other counsel. The court, after hearing the arguments of the parties, denied confirmation of the plan (with leave to file a new plan within 10 days), denied the motion to dismiss, and granted the motion for relief from the automatic stay.

The court has carefully reviewed the memoranda submitted by the debtor (which he indicates in his letter to the court he originally prepared to assist his counsel). It would serve no useful purpose to respond to each of the points the debtor makes. With respect to the denial of confirmation, the court remains

convinced that, taking into account the totality of the circumstances, including the minimal proposed payment on account of unsecured debts, the fact that almost 94% of the unsecured debt represents debt that was determined to be nondischargeable under the chapter 7, and the lack of any record of earnings to support even the token proposed payment,[4] plan confirmation was properly denied under Sec. 1325(a)(3) of the Bankruptcy Code, which requires that a plan be proposed in good faith. *See, Deans v. O'Donnell*, 692 F.2d 968(4th Cir. 1982) and *Neufeld v. Freeman*, 794 F.2d 149(4th Cir. 1986). The court specifically rejects the argument that as long as a plan technically complies with the liquidation test of Sec. 1325(a)(4) and the net disposable income test of Sec. 1325(b)(1)(B), it is confirmable without regard to the percentage payout and the nondischargeable nature of the debt under chapter 7. Accordingly, the court denies the motion to alter or amend the order denying confirmation.

With regard to the order granting relief from stay, however, the court finds that the debtor has raised a substantial issue, not specifically addressed at he February 14, 1995 hearing, that should have been considered

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[4]The debtor's statement of financial affairs reflects that his annual earnings were $2,520 in 1992, $2,590 in 1993, and $10,000 in 1994. His plan was based on projected net annual earnings of $25,800.

prior to granting relief from the automatic stay. As noted above, the major aim of the Prince William County suit is to subject the assets of National Sportsman Association to the payment of the nondischargeability judgment. Under Sec. 522(c) of the Bankruptcy Code, however, property exempted by the debtor in the course of a bankruptcy is not liable, post-petition, for any debt that arose pre-petition, except for nondischargeable taxes and alimony and certain kinds of nondischargeable debts to owed to "a Federal depositary institutions regulatory agency." The debtor claimed as exempt the National Sportsman Association stock. As noted above, no objection was filed to the claim of exemption. Although the judgment creditors allege that the stock was worth far more than the $10.00 value placed on it by the debtor, if the debtor's claim of exemption effectively exempted his entire interest in the stock, then it follows that, notwithstanding the nondischargeability of the judgment, the judgment cannot be enforced against the stock. Additionally, if the debtor effectively claimed his entire interest in the stock as exempt, it necessarily follows that the stock was the debtor's to do with as he pleased, and its subsequent transfer to his wife could not have been fraudulent as to the prepetition claims of Walter M. Rogers, Jr., Ronald A. Rogers, or Rogers Brothers, Inc. Although the decision of this court in *Ainslie v. Grablowsky (In re: Grablowsky)*, 149 B.R. 402 (Bankr.E.D.Va.

1993), aff'd sub.nom. *Addison v. Reavis*, 158 B.R. 53 (E.D.Va. 1993), aff'd sub.nom. *Ainslie v. Grablowsky (In re: Grablowsky)*, 32 F.3d 562 (4th Cir. 1994) (unpublished) seemingly holds that the stock is exempt only to the $10.00 value placed on it by the debtor, the case must be read in light of the rationale employed by the District Court (and adopted by the Court of Appeals) in affirming this court's decision. The District Court, in holding that a $1.00 claim in two partnerships exempted only $1.00 and not the full value of the assets, distinguished *Taylor v. Freeland & Kronz*, --, 112 S.Ct. 1644, 118 L.Ed. 2d 280 (1992) by relying on what the District Court held was a long-standing and well understood practice in Virginia of placing only nominal values (typically $1.00) on assets of doubtful value, with the understanding that those values would be revised upward, to the extent that the unused dollar value of the debtor's exemptions would permit, once the debtor's actual equity in the asset was established. But that is different from the situation where, as arguably occurred here, the debtor asserts that the asset is actually worth $10.00, and there is no indication that the debtor intended, or that the chapter 7 trustee would have reasonably understood, that only a nominal value was being asserted. *See, Allen v. Green (In re: Green)*, 31 F.3d 1098 (11th Cir. 1994) (Debtor entitled to entire $15,000 proceeds of lawsuit valued on schedules at $1.00; *Grablowsky* criticized and rejected).

Because this issue of whether the debtor effectively exempted his entire interest in the National Sportsman Association stock was neither briefed nor argued at the hearing on relief from the automatic stay, the court will set the debtor's motion to alter or amend the order granting relief from the automatic stay for a hearing and will require the debtor promptly to serve a copy of the "Memorandum in Opposition of Motion for Relief from Stay" on counsel for the judgment creditors and on the chapter 13 trustee. No hearing will be held, and the motion will be dismissed as moot, if the chapter 13 case is dismissed under Local Rule 313(G) for failure to file an amended chapter 13 plan or an appeal of the order denying confirmation.

Date: 2/28/95
Alexandria, Virginia

/S/ Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

NOTICE OF JUDGMENT OR ORDER
Entered on Docket 3/2/95

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
CHARLES EDWARD LEE ROGERS	)	Case No. 94-14656-AM
	)	Chapter 13
Debtor	)	
	)	
WALTER M. ROGERS, et al.	)	
	)	
Movants	)	
	)	
vs.	)	Contested Matter
	)	No. 95-0040
CHARLES EDWARD LEE ROGERS	)	
	)	
Respondent	)	

MEMORANDUM OPINION

This matter is before the Court on the motion of the debtor/respondent filed February 22, 1995, to alter or amend the order signed February 14, 1995, and entered on the docket on February 23, 1995, granting relief from the automatic stay in order to permit the movants to prosecute a fraudulent conveyance action in Circuit Court of Prince William County, Virginia, to which the debtor is a party defendant.

The background and procedural posture of this case are set forth in the Memorandum Opinion of this Court filed February 28, 1995, and will not be repeated here except to note that the debtor has appealed from the order of

this Court denying confirmation of his chapter 13 plan. After memorandum opinion and order were issued setting this matter down for argument, the movants filed a memorandum in opposition to the debtor's motion, and argument was heard in open court on March 14, 1995. At the conclusion of the hearing, the Court took the matter under advisement. The debtor subsequently filed, and the Court has carefully considered, the debtor's *pro se* brief further addressing the issue of collateral estoppel which had been argued at the hearing.

The judgment creditors' argument, couched in its simplest terms, is that the question of whether the entire value of the debtor's stock in National Sportsman Association, Inc. was effectively exempted in the debtor's prior chapter 7 case, or only $10.00 worth, has already been ruled upon by the Circuit Court of Prince William County, and further litigation of the issue is barred by *res judicata* or collateral estoppel. From copies of pleadings presented by the judgment creditor, it appears that NSA filed in the state court chancery suit a plea in bar asserting that the complainants were barred by *res judicata* from relitigating the value of the NSA stock, since the complainants, who were creditors and participated in the debtor's chapter 7 case, had never objected to the debtor's $10.00 valuation of the stock on his bankruptcy schedules and homestead deed. In a brief filed in the state court in support of the plea in bar, NSA specifically called the Circuit

Court's attention to the Supreme Court's decision in *Taylor v. Freeland & Kronz* - U.S.-, 118 L.Ed. 2d 280, 112 S.Ct 1644 (1992). The complainants, in response, argued that Taylor was distinguishable and invited the Circuit Court's attention to the decision of the United States District Court in *Addison v. Reavis*, 158 B.R. 53 (E.D.Va 1993), aff'd sub.nom.*Ainslie v. Grablowsky*, 32 F.3d 562 (4th Cir. 1994) (unpublished). On November, 23, 1993, the state Circuit Court entered an order overruling the plea in bar in which it ruled:

> that Defendant National Sportsman Association, Inc.'s Plea in Bar based upon the preclusive effect of Charles Rogers stating a $10.00 value for the stock of National Sportsman Association, Inc. on his homestead deed is dismissed, and the Court finds that the Complainants are not estopped from challenging the value of the stock of National Sportsman Association, Inc. at the time of its transfer.

The ruling made by the Circuit Court, although not specifically addressing each of the components of the argument made by the debtors in this Court, focuses on the same subject matter, namely the issue of what it was the debtor exempted in his chapter 7 case - the entire stock interest in NSA or only $10.00 worth of stock. The debtor proffered, and the Court accepts as true for the purposes of

ruling on the present motion, that his subjective intent was to exempt the entire stock interest. The debtor also argues, and the Court concurs, that the Circuit Court's ruling cannot technically operate as collateral estoppel with respect to the present motion before the Court, since the order overruling the plea in bar is not a final or appealable order but is purely interlocutory in nature.[1]

Nevertheless, apart from issues of *res judicata* and collateral estoppel, there is an issue here of judicial comity, that is to say, the deference which the courts of one jurisdiction will give the decisions of courts in another jurisdiction, not as a matter of obligation, but out of respect. This motion involves an action pending in another court having proper jurisdiction of the parties. The trial is set for the very near future. The state court has addressed and ruled upon essentially the same issue the debtor now seeks to raise.

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[1]For the purpose of this decision, this Court relies on the four-part test for collateral estoppel articulated in *In Re: Ross*, 602 F.2d 604, 608 (3rd Cir. 1979): "(1) the issue sought to be precluded must be the same as that involved in the prior action; (2) that issue must have been fully litigated; (3) it must have been determined by a valid and final judgment; and (4) the determination must have been essential to the prior judgment."

That ruling is fully subject to appeal in the event the trial court ultimately enters a judgment against the debtor on the merits. While the ruling may or may not be the ruling which this Court would reach presented with the same question, it is not plainly wrong or without a substantial basis in applicable case law. At best, it is a ruling on which reasonable minds might differ. Under such circumstances, respect for the state court dictates that this court not unnecessarily substitute its own judgment for that of the state court, particularly as the debtor has and claims no current interest in the NSA stock, which he transferred to his wife back in 1990. Thus whether or not the judgment creditors are successful in their efforts to subject the NSA stock to the payment of their judgment, as sought in Count I of the bill of complaint, can have no effect on the debtor's chapter 13 case or his ability to formulate or implement a plan.[2] Similarly, the debtor's chapter 13 estate will not be adversely affected by any ruling avoiding the transfer of NSA's assets to American Sportsman Association, Inc. as sought in Count II, nor would the chapter 13 estate be affected by a ruling that NSA and ASA are alter egos of the debtor, as sought in Count III, since the debtor does not

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[2]Had the debtor retained ownership of his NSA stock and were he relying on his income from the corporation to fund the plan, the issue would be of course very different.

claim an ownership interest in either corporation. Only a ruling on Count IV of the complaint--which seeks damages for an alleged conspiracy[1] by the debtor and his wife to defraud the complainants by transferring assets and diverting income--could have an impact on the chapter 13 case, and the Court in granting relief from the stay on February 14, 1995, specifically limited the complainants to liquidating their claim in the state court and prohibited execution on any judgment that might be obtained without further order of this Court or unless the chapter 13 case is dismissed.

Accordingly, having considered the arguments of the parties, the Court concludes that the debtor's motion to alter or amend the order dated February 14, 1995, granting relief from the automatic stay, should be denied. A separate order will be entered.

Date: 3/21/95
Alexandria, Virginia

/S/ Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

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[1]The alleged conspiracy must, of course, be limited to actions undertaken subsequent to the filing of the debtor's chapter 7 petition.

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

WALTER M. ROGERS, Jr. et. al.,	:	
Complainants,	:	
v.	:	Chancery No. 33841
CHARLES E. L. ROGERS, et. al.,	:	
Defendants.	:	

MOTION FOR RECONSIDERATION

COME NOW DEFENDANTS, Charles E. L. Rogers, NSA, ASA and Eleanor Rogers, by counsel, and respectfully request this honorable Court to reconsider its Final Decree of 9 June 1995 on the following grounds:

1. That per *In Re Green*, and related case law, Complainants have waived their right to proceed in that they failed to raise the issue of value of NSA stock, and other related issues, in the bankruptcy proceeding. Furthermore, the filing of a valid homestead deed, not properly objected to, forecloses their right to proceed.

2. That the *in personam* judgment against Eleanor Rogers is improper in that it was not relief requested in

Complainants' original, or two subsequent amended, Bills of Complaint.

3. That there is insufficient evidence to support the final decree and relief granted therein.

4. That the State Circuit Court is without jurisdiction to hear this matter.

5. That a judgment against Eleanor Rogers is not supported by the law or the facts. Furthermore, that even if there is sufficient evidence for an *in personam* judgment, and even if said judgment is otherwise proper, there is insufficient evidence to support a judgment in the amount of $200,000.

6. That Complainant's claims are barred by the doctrines of collateral estoppel and res judicata.

7. That the final decree should be set aside on all grounds stated: in open court in the trial of this matter, in open court during all pre-trial motions; and upon all pleadings filed herein.

CHARLES ROGERS
NSA
ASA
ELEANOR ROGERS
By Counsel

(2)

Supreme Court, U.S.
FILED
JUN 25 1996
CLERK

No. 95-1933

In The

Supreme Court of the United States

October Term, 1995

CHARLES ROGERS, *et al.*,

Petitioners,

vs.

WALTER ROGERS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENTS' BRIEF IN OPPOSITION

H. JAN ROLTSCH-ANOLL
Counsel of Record
COMPTON & DULING, L.C.
Attorneys for Respondents
14914 Jefferson Davis Highway
Woodbridge, Virginia 22191
(703) 446-2437

9071
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

32 pp

QUESTIONS PRESENTED

Whether personal property declared exempt at a certain value by operation of the United States bankruptcy law can be the subject of a subsequent state court fraudulent conveyance action filed by the same parties which failed to challenge the value or the exempt nature of such property in the United States Bankruptcy Court.

Whether the value of exempt property set by operation of the United States bankruptcy law can be challenged in a subsequent state court action by the same parties which did not challenge said value in the United States Bankruptcy Court.

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APPENDIX

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Appendix B — Excerpts of Bankruptcy Trial Transcript Dated June 6, 1991; pp. 310-311, 339 ..... 5a

STATEMENT OF THE CASE

Prior to July 1, 1990, Respondents were creditors of Charles Rogers for a sum in the amount of $475,000 which arose from loaned and entrusted funds. These funds were never repaid and Respondents instituted legal proceedings in May of 1990 in an attempt to determine what had become of the funds. The legal proceedings were initiated in state court and alleged fraud and breach of fiduciary duty and requested an accounting. Soon after the initiation of the state court proceedings, on June 28, 1990, Charles Rogers filed a Chapter 7 bankruptcy petition and in the context thereof, listed his 100% interest in the closely held corporation, National Sportsman Association, Inc. ("NSA") as exempt for a value of $10.

Respondents filed two adversarial claims in the context of the Chapter 7 bankruptcy, one relating to the loss of the loaned funds and the other dealing with the loss of the entrusted funds. Among the grounds for the request of non-discharge in each of the adversarial actions was the allegation that the debtor had failed to adequately explain and account for the loss of the Respondents' $475,000 and had failed to meet the requirements of fiduciary duty with respect to the entrusted portion of the funds.

Charles Rogers was denied discharge of $145,000 of the debt upon a finding by the bankruptcy court that he had been entrusted with these funds and had unlawfully and wrongfully disposed of or converted said funds by co-mingling and failing to properly account for the entrusted funds. The Respondents then attempted to collect the judgment entered by the bankruptcy court and initiated the state court collection/fraudulent conveyance action which is the subject herein (the "State Court Action").

For at least fifteen years preceding the date of the Chapter 7 Bankruptcy filing, Charles Rogers owned all of the outstanding shares of stock in NSA. Unknown to any of the parties in interest during the bankruptcy, two days prior to her husband filing a petition in bankruptcy, Petitioner, Eleanor Rogers, opened a commercial checking account under the name of American Sportsman Association, Inc. ("ASA") using NSA's Federal Tax Identification Number. Four days later and two days after the filing of his Chapter 7 petition, on July 1, 1990, Charles Rogers transferred all of his ownership interest in NSA to his wife in exchange for $10 (the "Transfer").

It was established during the State Court Action that at the time of the Transfer, Eleanor Rogers knew her husband had filed a petition in bankruptcy, knew that he owed Respondents a substantial debt and knew that Respondents were demanding repayment of the debt.

Also unknown during the bankruptcy and established for the first time during the State Court Action, was the fact that on July 6, 1990, Eleanor Rogers deposited the first of over seven hundred NSA customer checks into the secret, ASA bank account. The deposit made on July 6, 1990 into ASA's account was comprised completely, of NSA gross receipts in the form of customer checks made payable to NSA. Petitioners now claim that on July 3, 1990 Eleanor Rogers transferred the bulk of NSA assets into ASA. (Petition for Writ, 5).

It was stipulated to during the State Court Action that for the six-month period following the Transfer, NSA customer checks were consistently and exclusively deposited into ASA's account. It was also undisputed that of the 726 total checks deposited into the ASA account from the date of the Transfer through September of 1993, 713 of them were payable to NSA.

The evidence presented in the State Court Action established that the activity in NSA's accounts immediately prior to and following the Transfer, decreased, such that NSA appeared to be worthless. It was established that immediately following the Petitioner's filing of the Chapter 7 bankruptcy action, the operations of NSA were simply being run through the books and records of ASA.

In this Court, Petitioners state, for the first time, that ASA was specially created for the purpose of receiving NSA assets. (Petition for Writ, p. 5). Ironically, the record will reflect that this is a fact the **Respondents** succeeded in establishing during the State Court Action and that the **Petitioners** adamantly denied throughout those proceedings. Petitioners claimed throughout the State Court Action that ASA was initially created for a separate and distinct purpose which had nothing to do with the operation of NSA. (State Court Trial Transcript, April 13, 1995, 128-131).

At the 11 U.S.C. § 341 Hearing of Creditors, the debtor was questioned with respect to the value stated for NSA on his bankruptcy schedules. The Petitioner contended that NSA was worthless because its liabilities exceeded its assets and the debtor was no longer capable of operating the business. Both Eleanor and Charles Rogers were questioned as to the value, books, records and business of NSA during discovery in the adversarial bankruptcy actions. (Bankruptcy Trial Transcript, June 6, 1991, 310-311; 339-340). The debtor and his wife, consistently stated that NSA had no value since its liabilities exceeded its assets and its assets had a value of less than $1000. A review of bank records of NSA indicated no receipts being received by the corporation and created the illusion that NSA had no ongoing business, thereby lending credence to the debtor's testimony.

In the State Court Action, it was proven that at the time of the Transfer, NSA had a valuable customer list capable of and in fact, generating a continuous stream of income. The trial court found that at the time of Transfer NSA had a substantial value, a value closer to the $294,000 figure alleged by Respondents than the $10 claimed by Petitioner.

Neither Charles nor Eleanor Rogers ever disclosed the existence or operation of ASA at the § 341 meeting of creditors. It was not disclosed during discovery in the adversarial actions or at the trial of the adversarial actions. Additionally, it was never disclosed at the time of the meeting of creditors that NSA was being operated under the name of, and through the books of ASA. None of ASA's books and records were ever produced or reviewed during the bankruptcy action. The Respondents only became aware of the existence and operation of ASA during discovery in the State Court Action.

It should be noted that the Respondents did not prevail on their conspiracy claim in the State Court Action *only* because of a finding by the trial court that Respondents had failed to prove damages with sufficient certitude relating to the conspiracy count. The trial court specifically found that the fraudulent conveyance of NSA and the use of ASA to receive NSA income was a product of Charles and Eleanor Rogers' shared intent to hinder, delay or defraud the creditors of Charles Rogers. Judge Hamblen Letter Opinion, May 3, 1995, *Rogers, et. al v. Rogers, et. al*, Chancery No. 33841, at 4.

The trial judge found as a matter of fact that ". . . [T]he manner in which funds belonging to NSA were transferred to the new corporation bespeak an intention on her [Eleanor Rogers] part to create yet another barrier between what she and her husband both obviously expected to be a continuing stream of income and his creditors." *Id.*

Additionally the trial judge felt compelled to comment on the credibility of Charles and Eleanor Rogers as a part of his factual findings. The trial judge stated that the Petitioners' testimony during the State Court Action was ". . . [C]learly designed to leave an impression of their intent and actions which is wholly at odds with what the bulk of the credible evidence establishes to have been reality." *Id.* at 2.

REASONS FOR DENYING THE WRIT

The Petitioners rely upon this Court's decision in *Taylor v. Freeland*, 503 U.S. 638 (1992) and the Eleventh Circuit's decision in *In re Green*, 31 F.3d 1098 (1994) in claiming that the state court's decision is contrary to decisions of this Court and applicable federal law. Petitioners err in their position that these decisions apply to the case at bar. Both *Taylor* and *In Re Green* are clearly distinguishable on the facts since neither case involved a conspiracy by the debtor to mislead and misrepresent the true value of the asset at the time of the claimed exemption.

In *Taylor* the trustee was afforded full and fair disclosure as to the potential value of the lawsuit claimed as exempt. It was clear to all parties involved in *Taylor* that the actual value of the lawsuit was unknown and there was no attempt to convince the trustee that the value of the asset was in truth the $1 stated on the bankruptcy schedule. Likewise, in *In re Green*, the trustee affirmatively conceded that he understood the $1.00 listing on the bankruptcy petition represented a contingent value for the asset and that he had not been misled into believing the lawsuit claimed as exempt had an actual present value of $1.00. *Id.* 1098.

Unlike *Taylor* and *In re Green*, this case presents facts in which the debtor together with his wife, both Petitioners herein, set about to purposefully mislead the creditors and trustee as to any potential value for the asset at issue. In the case at bar, the

Petitioners succeeded in convincing all parties in interest that the asset in question was worthless and they did so by hiding its value under the name of a new, undisclosed, corporate entity. It was established in the State Court Action that, unknown to any of the parties in interest and undisclosed by either the debtor or his wife when questioned under oath, NSA continued to do business and to process gross receipts under the name of ASA and through ASA's books and records.

Bankruptcy Rule 4003(b) operates as a very short statute of limitations against creditors challenging a claimed exemption and requires an objection to the property claimed as exempt within thirty days of the meeting of creditors. It has long been established that a cause of action for fraud does not accrue while the fraud is concealed. *Bailey v. Glover*, 21 Wall 342, 349-350, 22 L. Ed. 636 (1875); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). This Court has consistently held that statutes of limitation are to be interpreted reasonably so as not to become an instrument which encourages and protects a fraudulent practice. *Id.* In *Bailey* this Court held that in cases of fraud there is an implied exception in a statute of limitations for a situation which involves a purposeful concealment which continues beyond the time the statute would bar action to undo the fraud. In *Holmberg* the Court went on to state that the exception recognized by this Court in *Bailey* is written into every federal statute of limitations. It was not this Court's intention that their decision in *Taylor* overrule the long-standing policy against allowing parties to use the law to perpetrate and protect them against a concealed fraud.

Taylor involved no fraud on behalf of the debtor and therefore is not applicable to the case at bar. The state court's decision in this matter is fully consistent with the law as expressed by this Court in *Bailey* and *Holmberg*. The state court's decision is consistent with the underlying policy of federal and state law not to allow a purposefully concealed fraud

to be protected by the arbitrary operation of a statute of limitations.

Even if *Taylor* applied to the facts at bar, which Respondents contend it does not, the state court's decision in this case does not serve to deny the debtor the claimed exemption. The decision only serves to allow the creditors to seek satisfaction of their judgment against that portion of the asset which was not claimed as exempt by the debtor.

As pointed out in *Addison v. Reavis*, 158 B.R. 53 (E.D. Va. 1993) *aff'd sub nom. Ainslie v. Grablowski*, 32 F. 3d 562 (4th Cir. 1994), Virginia has selected, pursuant to federal law, to opt out of the exemptions provided by the bankruptcy code and to allow debtors to claim only those exemptions enumerated under Virginia law. *See* 11 U.S.C. § 522 (b)(2)(A) and Va. Code Ann. § 34-3.1 (Mich. 1990). The debtor in the present case claimed the exemptions in question pursuant to homestead exemptions under Virginia law.

Virginia law does not confine the debtor to the specific amount listed for a particular exemption on his homestead deed but rather allows the debtor to amend upwards the valuation stated in the schedule. *In re Waltrip*, 360 F. Supp. 488 (E.D. Va. 1966). Virginia law allows debtors to state nominal values for assets and to adjust them upwards when the true value of the asset is determined. *Addison* at 57. By not objecting to property claimed as exempt in a bankruptcy schedule, the trustee and creditors only recognize that the debtor has a valid statutory basis for the claim and not that the debtor's valuation of the property at issue is conclusive. *Id.* at 61.

The question in the case at bar, as in *Addison*, is not whether the debtor is entitled to the exemption but rather what did the debtor actually exempt? In *Addison*, the court dealt with an

ownership interest in various partnerships. In the case at bar the asset at issue is similar, ownership in a closely held corporation. In both cases the assets at issue were divisible and the *Addison* court determined that in such cases, ambiguities in the debtors schedules as to how much of the divisible asset was being claimed as exempt must be construed against the debtors. *Id.* at 60.

In the case at bar, the ambiguity in the Petitioner's bankruptcy schedule arises from his claim of a $10 exemption in a divisible asset. He does not state that a specific number of shares of stock are claimed as exempt with a value of $10, he claims a $10 exemption in his 100% ownership. Appropriately construing the ambiguity against the debtor, it is clear that in this case, the debtor claimed as exempt $10 worth of his ownership interest, leaving the remainder of the asset available for creditors' claims.

The presence of a concealed fraud at the time of the claimed exemption arguably voids the entire exemption. However, assuming for the purpose of argument only, that the $10 exemption claimed on the debtor's bankruptcy schedule was available to the debtor pursuant to Virginia law, Respondents contend that Virginia law allows only exemptions up to a stated dollar amount and that the debtor has not successfully exempted any property beyond the statutory limit. Since the debtor chose not to amend his schedule to exempt any more of his ownership interest in the corporation beyond the $10 claimed on his bankruptcy schedule, he is not entitled to claim additional value beyond the statutory amount as exempt property.

Taylor was written in the context of a debtor who explicitly claimed as exempt the entire value of property worth an unknown amount of money. In this case, the debtor did not claim the entire amount of his interest in the corporation as exempt but

instead claimed a precise dollar amount of his interest exempt. The considerable amount of value remaining in the divisible asset, was never claimed as an exemption and remains available for the satisfaction of creditors' claims.

CONCLUSION

Respondents contend that *Taylor* is not applicable to the facts at bar because of the element of purposeful concealment by the debtor at the time of the claimed exemption. Since *Taylor* does not apply and is clearly distinguishable on the facts, the state court's decision is not inconsistent with decisions of this Court. On the contrary, the state court's decision is entirely consistent with the law and policy as expressed by this Court in *Bailey* and *Holmberg*. Since the state court decision is consistent with the law and policies expressed by this Court, there is no need for this Court to do further inquiry into this matter.

Even if the Court were of the opinion that *Taylor* controls the case at bar, the state court's decision is not contrary to the holding in *Taylor*. The state court's decision in this case does not operate to deny the debtor the exemption claimed. The decision merely disallows the debtor from claiming, as exempt, property which exceeds the statutory limit as set by Virginia law and which was not unambiguously stated as a claimed exemption on the debtor's schedules.

WHEREFORE, the Respondents respectfully request the Court deny the Petition for a Writ of Certiorari herein.

Respectfully submitted,

H. JAN ROLTSCH-ANOLL
Counsel of Record
COMPTON & DULING, L.C.
Attorneys for Respondents
14914 Jefferson Davis Highway
Woodbridge, Virginia 22191
(703) 446-2437

APPENDIX A — EXCERPTS OF STATE COURT TRIAL TRANSCRIPT DATED APRIL 13, 1995; pp. 128-131

[Commencing at page 128]

to this attorney's questions and answer them directly.

THE WITNESS: Okay.

THE COURT: You have a tendency, pronounced, if I may say, not to do that. And it's prolonging this hearing.

THE WITNESS: Okay.

BY MR. WEBB:

Q My question was: When did you decide to start ASA?

A I think it was — I think it was like July, '90.

Q Why did you decide to start ASA?

A I — Well, first — I wanted two separate clubs.

Q Why?

A Because I wanted to have two separate clubs, because with the way that the NSA was constructed, I was doing so much work on the phones, and things like that, I wanted to take the ASA and divide it for small game hunters where they would pick four or five properties. And they wouldn't have to call in to me all the [129] time, see. And I could — The big game hunters could have another one. So, the small game hunters could have their privacy, and they wouldn't be running into each other and always complaining. So, that would be for the small game hunters.

Appendix A

THE COURT: Excuse me, ma'am.

(A brief discussion was held off the record.)

THE COURT: I'm sorry, Ms. Rogers. Go ahead. Would you repeat your question, please?

MR. WEBB: Yes, sir.

BY MR. WEBB:

Q The question was, Ms. Rogers — Let me start over again.

THE COURT: Why did you want to start the club?

BY MR. WEBB:

Q Why did you want to set up the separate club?

A Well, I wanted to set up the separate club because I wanted to make the small game hunters into one club. This would eliminate the [130] phone when you're working, you know, with a lot of members, because then the small game hunters wouldn't have to call in, like the deer hunters. So, they would get a cheaper rate, and they wouldn't be paying for my service, see. So, if I could divide the club into small game hunters and big hunters, that would help a lot.

Q Were you able to do that?

A I started it —

Appendix A

Q Answer first: Were you able to do that?

A No.

Q Why not?

A Because I just didn't have — I just didn't have the time.

Q What was taking up your time?

A What was taking up my time was basically dealing with my husband and his problems — a lot of his ups and downs — and then also handling the NSA members. I just didn't have time to, you know, construct it the way I wanted it to be.

Q Do you consider ASA to be a corporation [131] separate from NSA?

A Yes.

Q There came a time, as you're aware — You've heard testimony about checks being deposited made out to NSA and ASA bank accounts; do you remember that testimony?

A Yes.

Q You are aware that that happened; are you not?

A Yes.

Q Do you know why that occurred?

A Well —

Q And if you do, why did it occur?

A Well, what happened was I had put $5,000 in when I started ASA of my money from my charge card to start it. And I put the — I had both corporations. I owned both corporations; so, therefore, I had put it in there to start so I could get the stuff for like different membership badges, and different cards, and stationary, and things like that, and sort of help that one go along. But I've had so much commotion, I haven't got it all right yet, so —

* * *

APPENDIX B — EXCERPTS OF BANKRUPTCY TRIAL TRANSCRIPT DATED JUNE 6, 1991; pp. 310-311, 339

[Commencing at page 310]

INTO IT.

Q TURNING TO THE NATIONAL SPORTSMAN ASSOCIATION. DID YOU TRANSFER THE STOCK OF THAT CORPORATION TO YOUR WIFE AND SON?

A I SOLD IT TO THEM.

Q HOW MUCH DID YOU SELL IT THEM FOR?

A FOR $10.

Q WHEN DID YOU CONSUMMATE THE SALE?

Q ABOUT TWO DAYS AFTER YOU FILED BANKRUPTCY?

A ON OR ABOUT JUNE 30TH.

Q WHAT WAS YOUR RATIONALE FOR TRANSFERRING THE NSA OVER TO YOUR WIFE?

A THE RATIONALE WAS THAT I WAS IN NO POSITION AT THE TIME TO HELP ON IT OR WORK WITH IT. IT HAD A NEGATIVE NET WORTH. IT HAD UNEARNED INCOME THAT HAD TO HAVE BEEN COLLECTED AND IT WASN'T EARNED. IT HAD NO ASSETS. IT LEASES PROPERTIES, AND ALL THE LEASES ARE YEAR-TO-YEAR, AND IT RUNS GENERALLY JULY 1ST TO JUNE 30.

SO AT THAT TIME OF TRANSFER, THERE WAS A

Appendix B

NEGATIVE NET WORTH. THERE WAS NO — THERE WASN'T ANY TYPE OF BIG DEAL OR ANY TYPE OF ASSETS, SO TO SPEAK. IF SOMEBODY WOULD TAKE AND WORK WITH IT, IT HAS POTENTIAL, AND SHE HAS TAKEN IT UPON HERSELF TO WORK WITH THAT, ALONG WITH MY SON, MY TWO SONS, AND THEY'RE TRYING TO MAKE A GO OF IT.

[311] Q HAVE YOU FILED YOUR TAX RETURNS FOR NSA FOR THE FISCAL YEAR ENDING JUNE 30, 1990?

A NO, I HAVEN'T.

Q WHEN WERE THEY DUE?

A MARCH 15, 1991, I BELIEVE.

Q YOU GOT AN EXTENSION TO FILE THOSE; DID YOU NOT?

A I GOT AN EXTENSION, YES, SIR.

Q ON MARCH 15TH, THE DUE DATE FOR FILING THESE TAX RETURNS, DID YOU FILE THEM YET?

A NO, I DIDN'T. I HAVEN'T FILED THEM, YET.

Q WHAT'S YOUR STATUS WITH THE IRS THEN?

A WELL, THE CORPORATION IS NOT GOING TO OWE ANY INCOME TAX, BECAUSE, AS YOU KNOW, IT'S A SUB-CHAPTER S CORPORATION, AND IF YOU'RE

LATE, AND DON'T OWE ANY INCOME TAXES, IT'S REALLY NOT A BIG DEAL. I'VE BEEN WORKING ON THIS, YOU KNOW, SINCE I GUESS BACK IN JUNE OF '90, ESPECIALLY SINCE NOVEMBER OF '90. I HAVEN'T HAD TIME TO DO ANYTHING ELSE.

Q ARE YOU IN DEFAULT THEN WITH THE IRS?

A NO.

MR. WEBB: OBJECT AS TO THE RELEVANCE OF THIS.

THE COURT: SUSTAINED.

MR. ROBERTS: YOUR HONOR, I JUST THINK IT GOES TO HIS BOOKKEPING AND RECORD KEEPING, AND WHETHER HE CAN EXPLAIN — WE ASKED FOR THOSE RECORDS FOR NSA, SO WE COULD

* * *

[Commencng at page 339]

A YES.

Q WAS IT STILL ACTIVELY ENGAGED IN THE BUSINESS OF PROVIDING HUNTING LAND FOR PEOPLE?

A YES, IT'S AN ALL-YEAR PROGRAM.

Q HOW WOULD YOU DESCRIBE THE PROFITABILITY OF NSA IN JUNE OF 1990?

Appendix B

A JUNE OF 1990, THERE WAS NOTHING LEFT. I STARTED WITH JUST LIKE A BLANK. I STARTED THE WHOLE NEW YEAR WITH NOTHING.

Q DID THE CORPORATION NOT HAVE ANY ASSETS, TO SPEAK OF, AT THE TIME THAT YOU TOOK IT OVER?

A NO, WE LEASED ALL THE LAND.

Q WAS THERE ANY CASH IN THE BANK?

A NO CASH IN THE BANK THAT I KNOW OF, BECAUSE HE WAS GOING TO CLOSE IT OUT. DARREN IS HANDLING THE NSA FINANCES. HE'S A CPA, MY SON, AND I'M JUST WORKING IT.

Q SO THERE WAS NO CASH WHEN YOU TOOK THE CORPORATION OVER?

A NO. I STARTED — WELL, NOT TO MY KNOWLEDGE, BECAUSE I SAID I WOULD START IT NEW, SO I JUST STARTED IT IN THE NEW YEAR. THE RENEWAL STARTED IN JULY.

* * *

(3)

Supreme Court, U.S.
FILED
AUG 30 1996
CLERK

No. 95-1933

In The

Supreme Court of the United States

October Term, 1995

CHARLES ROGERS, *et al.*,

Petitioners,

vs.

WALTER ROGERS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF FOR PETITIONERS

E.E. SANDERS, JR.
Counsel of Record
Attorney for Petitioners
12504-C Lake Ridge Drive
Woodbridge, VA 22192
(703) 690-7000

9071
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

14 pp

QUESTIONS PRESENTED

Whether personal property declared exempt at a certain value by operation of the United States bankruptcy law can be the subject of a subsequent state court fraudulent conveyance action filed by the same parties which failed to challenge the value or the exempt nature of such property in the United States Bankruptcy Court.

Whether the value of exempt property set by operation of the United States bankruptcy law can be challenged in a subsequent state court action by the same parties which did not challenge said value in the United States Bankruptcy Court.

ARGUMENT

Petitioners would hardly deign to further burden this Court with a reply brief except for the fact that respondents in their Brief in Opposition obscures the paramount issue arising in this appeal — the virtual destruction of a property interest arising out of and created by federal law.

Respondents initially argue that the case of *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992) does not apply due to what respondents state is an "element of purposeful concealment by the debtor at the time of the claimed exemption." Brief in Opposition, p. 9.

This Court in *Taylor*, however, prohibited any judicial review of the behavior, motives, or intent of a debtor in regard to the existence or valuation of exempt property after the Bankruptcy Rule 4003 deadline. Even if such bad faith motive existed,[1] the uncontested facts show:

(a) The entire interest/assets of petitioner NSA, Inc. was declared exempt and valued at ten dollars;

(b) The thirty-day deadline of Bankruptcy Rule 4003 upheld by this Court in *Taylor* lapsed without objection or challenge by respondents as to NSA even though respondents carefully examined Charles Rogers at the meeting of creditors;

(c) According to 11 U.S.C. § 522(l) NSA became exempt property and by operation of 11 U.S.C. § 522(c) [". . . property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the

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1. Which petitioners more fully refute in the attached appendix.

commencement of the case . . ."] became unavailable to a creditor for a pre-petition debt (which this was);

(d) This state court action to collect a pre-petition debt was to declare a conveyance of federally-exempt property void and subject to pre-petition collection and the state court further held that Petitioner Eleanor Rogers must pay the sum of $200,000 to the respondents as profits of NSA/ASA wrongfully obtained.

Respondents make a crucial concession — that NSA is in fact exempt — but quibble about what was exempted. Brief in Opposition, p. 8 ("[I]t is clear that in this case, the debtor claimed as exempt $10 worth of his ownership interest . . .").

Respondents further concede an ambiguity in the schedules as to what property was exempted. Brief in Opposition, p. 8 ("In the case at bar, the ambiguity in the Petitioner's bankruptcy schedule arises from his claim of a $10 exemption in a divisible asset. He . . . claims a $10 exemption in his 100% ownership.").

Thus respondents concede that Charles Rogers did attempt to exempt a 100% interest in NSA and valued that interest at ten dollars. Charles Rogers even stated in his bankruptcy petition that "Liabilities exceed assets" *See* App. to Petition for Writ of Certiorari, p. 29. I would humbly submit to this Court that there is no ambiguity and that this Court's holding in *Taylor* and the Bankruptcy Act bar collection of a pre-petition debt from federally-exempt property or even its reevaluation or reinterpretation by a state court. The state court should have enforced, not destroyed, this federal property interest.

Respondents' final argument that prior precedent of this

Court permits a state court to reexamine the value and/or exempt nature of property declared exempt from creditor action for the purpose of applying that property to a pre-petition debt in the event of actual fraud is novel but without merit. I would suggest that this argument is foreclosed by this Court in *Taylor* which stated:

> Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality.

503 U.S. at 644.

The deadline in this case produced results unwelcome to respondents but it is a final result. The exempt nature of petitioner NSA is a settled fact and the state court erred in disregarding that fact and by violating federal law. This Court must correct that error.

CONCLUSION

None of respondents' objections have any merit; the facts remain, to paraphrase John Adams, stubborn, disturbing, and largely unquestioned. While this cause is not of the same historical import as *McCulloch v. Maryland*, 17 U.S.(Wheat.) 316 (1819) or *Cooper v. Aaron*, 358 U.S. 1 (1958), the principles are largely the same — that rights created by Federal law must be upheld against state usurpation. The state trial court did not uphold the exempt nature and value of petitioner NSA which had been created and protected by Federal law. The Virginia Supreme Court upheld that erroneous decision. This is petitioners last plea — to this Court — for relief. There is nowhere else for petitioners to go. Petitioners respectfully and humbly ask this Court to protect their Federally property interests and grant this Writ of

Certiorari, reverse the judgment of the Virginia Supreme Court with instructions to dismiss this fraudulent conveyance action.

Respectfully submitted,

E. E. SANDERS, JR.
Counsel of Record
Attorney for Petitioners
12504-C Lake Ridge Drive
Woodbridge, VA 22192
(703) 690-7000

APPENDIX A — EXCERPTED BRIEF FOR PETITIONER

Respondents misrepresent, in part, the grounds for the request of non-discharge. (Brief at 1). Respondents never asserted as grounds in the bankruptcy proceedings that petitioner Charles Rogers had failed to adequately explain and account for the loss of the respondents funds. Rather, respondents alleged that Charles had failed to adequately explain a loss or deficiency of assets to meet liabilities.[1]

Indeed, respondents made a diligent effort to prove that Charles could not adequately explain the large decrease in the value of NSA from $100,000+ at June 30, 1989 to $10 at June 30, 1990 and, in so doing, **conceded** that the value of NSA at June 30, 1990 was $10. (Bankruptcy Trial Transcript, June 6, 1991, 118-128). Ultimately, the Bankruptcy Court ruled that the allegation of failure to adequately explain a loss or deficiency of assets was not well-founded. (Count IV in Case No. 90-01260 and Count II in Case No. 90-01261 — Bankruptcy Court Final Order, November 9, 1991).[2]

Respondents state ". . . on July 3, 1990 Eleanor Rogers transferred the bulk of NSA assets into ASA." (Brief at 2).

Respondents omit the fact that liabilities were also transferred on July 3, 1990, and that the liabilities greatly

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1. The grounds for the request of non-discharge were: false pretenses; defalcation of a fiduciary duty; Embezzlement; fraudulent transfers of property; mutilation, falsification or failure to keep records; failure to adequately explain a loss or deficiency of assets; material omissions in bankruptcy petition and false oath. (Bankruptcy adversarial proceedings, Nos. 90-01260 and 90-01261).

2. Respondents took the position in bankruptcy court that NSA was worth no more than $10 on July 1, 1990 and elected to forego the coexisting but inconsistent remedy of an allegation of a fraudulent conveyance of NSA.

exceeded the assets. (Bankruptcy Trial Transcript, June 6, 1991 at 319 and State Court Trial Transcript, April 13, 1995 at 136).

Before Eleanor transferred the net liabilities of NSA to ASA, she obtained a $5,000 cash advance from her charge card and used the funds to capitalize ASA as part of her effort to honor the transferred liabilities. (Brief at 4a).

Respondents state "The deposit made on July 6, 1990 into ASA's account was comprised completely, of NSA gross receipts in the form of customer checks made payable to NSA." (Brief at 2).

Respondents correctly point out the composition of the July 6, 1990 deposit but misrepresent the nature of the gross receipts. Respondents represent the receipts as income/assets when, in fact, the receipts resulted in a liability because they represented prepayments for services to be provided in the future.[3]

Respondents state ". . . for the six-month period following the Transfer, NSA customer checks were consistently and exclusively deposited into ASA's account." *Id.*

Notwithstanding that a significant portion of the checks represented unearned income, respondents omit the fact that, during the time NSA checks were deposited into ASA's account, ASA was using the funds to pay down NSA liabilities.

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3. Respondents fail to acknowledge the accounting/legal principle that receipts for services are not income until the services are provided, and until such time as fees paid in advance are earned, they are to be treated as a liability. The principle that unearned income is a liability was addressed during the bankruptcy. (Bankruptcy trial transcript, June 6, 1991, at 320).

Appendix A

Respondents state ". . . of the 726 total checks deposited into the ASA account from the date of the Transfer through September of 1993, 713 of them were payable to NSA." *Id.*

Respondents omit the fact that ASA funds were, likewise, deposited into the NSA account. Also, respondents fail to disclose that certain checks payable to NSA were drawn on ASA's account and respondents ignore the fact that it makes no economic sense to examine deposits without also examining the disbursements.

On page 3 of the respondents Brief, they state ". . . following the Petitioner's . . . chp 7 bankruptcy action, the operations of NSA were simply being run through the books and records of ASA."

Respondents have lost sight of fact that Eleanor owned 100% of each corporation and considered NSA and ASA to be "brother/sister corporations" and often used one corporation to aid the other. (State Court Trial Transcript, April 11, 1995, at 85).

Moreover, examining deposits from the date of transfer through September 1993, serves no purpose as the only time period that should matter in a chapter 7 liquidation proceeding is the period up to the transfer (i.e. prior to July 1, 1990).

Respondents state "The debtor and his wife consistently stated that NSA had no value since its liabilities exceeded its assets and its assets had a value of less than $1000 . . . and . . . created the illusion that NSA had no ongoing business . . ." (Brief at 3). It was undisputed during the bankruptcy proceedings that **on the date of transfer** NSA was insolvent. (Bankruptcy Trial Transcript, June 6, 1991, 125-126, 319).

Further, it is a misstatement by respondents to imply that Charles and Eleanor stated that, post transfer, NSA had no value. On the contrary, during discovery both Charles and Eleanor revealed that NSA was an ongoing business in which Eleanor was investing her own resources. (Bankruptcy Trial Transcript, June 6, 1991, 310, 338-339 and respondents' letter to trustee, January 7, 1992, page 37 of Petition's Appendix).

Respondents state: ". . . at the time of the transfer, NSA had a valuable customer list capable of and in fact, generating a continuous stream of income. (Brief at 4). Any past customer of NSA at July 1, 1990 wouldn't have remained a customer if Eleanor hadn't invested her own resources into the enterprise in order to keep it operational. Also, the "stream of income" respondents refer too is not the consequence of a customer list, rather, it reflects payments for services rendered by Eleanor and Charles acting via the vehicle of NSA/ASA.

Respondents state that "The trial court found that at the time of transfer NSA had a substantial value, a value closer to the $294,000 figure alleged by Respondents than the $10 claimed by Petitioner". (Brief at 4).

Respondents omit the wording in the trial court's opinion that implies a finding of NSA's worthlessness, to wit: "...a simple order of reconveyance of, for instance the stock of NSA, would be a largely **empty remedy**, given the nature of the corporation and the business it conducts." Emphasis added (Judge Hamblen Letter Opinion, May 3, 1995, Rogers, et. al v. Rogers, et. al, Chancery No. 33841 at 5).[4]

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4. The trial court, in order to reach a finding of a fraudulent transfer, assigned a value of $147,000+ to NSA at the time of transfer. Conversely, the trial court, in order to justify the award of a $200,000 *in personam* judgment

(Cont'd)

Indeed, even the respondents' own valuation expert demonstrated doubt as to the value of NSA and indicated that it could be correct to consider NSA to be worthless on the date of transfer. (State Court Trial Transcript, April 12, 1995, at 65).

Contrary to the accepted asset valuation procedure in a chp 7 proceeding, the state court employed post filing hindsight and embraced a "going concern" valuation approach to arrive at a value on the date of transfer.[5]

The state court's finding of a fraudulent transfer rests squarely on its opinion of NSA's value at the time of transfer. If, as Petitioners argue, the state court's approach to estimating value is flawed, then the value arrived at by the state court is erroneous.

If, by employing the accepted balance sheet method of valuation (liquidation), NSA was worth $10 or less on the date of transfer, then, it necessarily follows, that the transfer could not have been fraudulent.

The ultimate factual issue is the valuation of NSA on June 30, 1990. Since respondents used the $10 valuation as evidence during the bankruptcy proceedings in their unsuccessful

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(Cont'd)

against Eleanor, acknowledged that because of the unique nature of the corporation, the stock may be essentially worthless. (*Id.* at 3 and 5).

5. The appropriate method of valuing property in a chapter 7 bankruptcy estate is liquidation. The bankruptcy court has defined this method of determining "value" of an asset as whether assets exceed liabilities. *Ocean Line of North Florida v. Twenty Grand Offshore, Inc.* 137 B.R. 540 (Bkrtcy, M.D. Fla. 1992).

attempt to prove that Charles could not explain NSA's decrease in value, they conceded the $10 value in the bankruptcy action. Hence, the doctrines of Collateral Estoppel and Estoppel in Pais act as a bar to the respondents' claim of a different valuation.

Respondents state "Neither Charles nor Eleanor Rogers ever disclosed the existence or operation of ASA at the Sec. 341 meeting of creditors." (Brief at 4).

Respondents mislead this Court as to the Sec. 341 meeting. Eleanor Rogers did not attend the meeting as she was not a debtor in the bankruptcy proceeding and a person cannot disclose something if they are not asked.

Respondents state that the existence or operation of ASA was not disclosed during the bankruptcy proceedings and that none of ASA's records were ever produced during the bankruptcy action. *Id.* Notwithstanding that no one asked about the existence of ASA or requested ASA's records during the bankruptcy action, ASA was not part of the bankruptcy proceedings because ASA, being solely owned by Eleanor, was not part of the bankruptcy estate.

On page 2 of their Brief, respondents state that two days **prior** to Charles' bankruptcy filing, Eleanor opened a checking account for ASA. Thereafter, respondents in their Brief attempt to equate the creation and operation of ASA to a conspiracy. Indeed, a significant portion of the state court action dealt with the pre- bankruptcy time period commencing on January 1, 1989.

This time period was extensively probed in state court despite Judge Mitchell's admonition against delving into

actions undertaken prior to the filing of the chp 7 bankruptcy petition on June 28, 1990 (Judge Mitchell's Memorandum Opinion of March 21, 1995 at 4).

In regards to the $200,000 *in personam* judgment, the trial judge treated all of the payments from NSA/ASA to Eleanor and Charles, for the 38 month period following the transfer, as income and opined that the sum represented proceeds of the assets which were fraudulently transferred.[6] (Judge Hamblen's Letter Opinion at 4).

Respondents assert that both Charles and Eleanor purposefully mislead the creditors and trustee as to any **potential** value for NSA. *Id.* On the contrary, every question posed to Charles and Eleanor was answered fully and truthfully. Even after the lengthy bankruptcy action was closed, the respondents submitted a comprehensive request to the trustee to reopen the case in order to void the transfer and recapture NSA.

The trustee, after carefully and responsibly reviewing the evidence as it related to the respondents request, declined to reopen the case. *See* Respondents' letter to trustee of January 7, 1992 and trustee's letter to respondents of February 16, 1992, shown in the Appendix to the Petition at pages 33-38 and 39-40, respectively.

Respondents state: "unknown to any of the parties in

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6. Petitioners argued unsuccessfully that since NSA was transferred during the pendency of the chp 7 bankruptcy the proceeds garnered from NSA would revert back to the Bankruptcy estate along with NSA and since assets of a bankruptcy estate are under the sole jurisdiction of the Bankruptcy court, a state court lacks the authority to decree the disposition of such assets. (Transcript of Motion For Reconsideration, June 30, 1995, 24-25).

interest and undisclosed by either the debtor or his wife . . . NSA continued to do business . . ." (Brief at 6). To the contrary, both Charles and Eleanor disclosed that NSA continued to do business after the transfer. (Bankruptcy Trial Transcript, June 6, 1991, 310, 338-339) Also, *See* Respondents' letter to trustee, January 7, 1992, at 37 of Petition's Appendix.

The bankruptcy judge, after lengthy proceedings, did not find fraud. The trustee, after an independent, post bankruptcy, investigation, did not find fraud. Only the state court concluded that the NSA transfer was fraudulent.

Respondents correctly state that Charles did not amend his homestead deed to reflect a different value beyond the $10 claimed on his bankruptcy schedules and homestead deed.

Charles did not amend his schedules and homestead deed because there was no need too. In a chapter 7, values of assets are set at the date of filing. The value of an asset at the date of filing is not determined three or five years later. Extensive post-filing hindsight is not and cannot be used in a chapter 7 liquidation bankruptcy proceeding, and any computation of value which utilizes a "going concern" approach or focuses on a speculative "potential value" is inappropriate.